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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

NO. 82-6870

JIMMIE WAYNE JEFFERS,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Arizona Supreme Court may constitutionally sustain Petitioner's capital sentence, absent a remand for resentencing, where on appeal it fully reverses one of the statutory aggravating circumstances relied upon by the trial judge and substantially modifies the other.

2. Whether the Arizona Supreme Court's disjunctive interpretation of the statutory aggravating circumstance "especially heinous, cruel, or depraved" in Petitioner's case implies a construction so broad that it cannot be viewed as a meaningful limitation on sentencer discretion as required by the Eighth and Fourteenth Amendments.

3. Whether the warrantless seizures of Petitioner's written communications, while he was a pretrial detainee and several months prior to the murder, violates Petitioner's Fourth and Fourteenth Amendment rights where such official seizures were neither supported by probable cause, reasonable suspicion or even the hint of criminal activity.

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IN THE

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NO._____

JIMMIE WAYNE JEFFERS,

Petitioner,

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THE STATE OF ARIZONA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE

ARIZONA SUPREME COURT

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Arizona entered on January 24, 1983.

CITATION TO OPINIONS BELOW

The opinion of the Supreme Court of Arizona is reported at __Ariz.__, __P.2d__ (1983), filed Jan. 24, 1983, reproduced in Appendix A.

JURISDICTION

The final judgment of the Supreme Court of

Arizona was entered on January 24, 1983, and is set out in Appendix A hereto. A timely motion for rehearing was denied on April 5, 1983. The Arizona Supreme Court's order denying rehearing is set out in Appendix B. This Petition for Certiorari has been filed within sixty (60) days of the Arizona Supreme Court's denial of a Motion for Rehearing. Thus, the jurisdiction of this Court is properly invoked under 28 U.S.C. Sec. 1257(3), Petitioner having asserted below and asserting here the deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Whether the Arizona Supreme Court may constitutionally sustain Petitioner's capital sentence, absent a remand for resentencing, where on appeal it fully reverses one of the statutory aggravating circumstances relied upon by the trial judge and substantially modifies the other.

2. Whether the Arizona Supreme Court's disjunctive interpretation of the statutory aggravating circumstance "especially heinous, cruel, or depraved" in Petitioner's case implies a construction so broad that it cannot be viewed as a meaningful limitation on sentencer discretion as required by the Eighth and Fourteenth Amendments.

3. Whether the warrantless seizures of Petitioner's written communications, while he was a pretrial detainee and several months prior to the murder, violates Petitioner's Fourth and Fourteenth Amendment rights where such official seizures were neither supported by probable cause, reasonable suspicion or even the hint of criminal activity.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States (Appendix C, D, and E respectively) and Section 13-703 of the Arizona Revised Statutes (Appendix F).

STATEMENT OF THE CASE

This is a petition for writ of certiorari to review the judgment of the Arizona Supreme Court entered on January 24, 1983, affirming Petitioner's conviction of first degree murder and sentence to death.[1]

The facts which give rise to Petitioner's conviction and sentence are set forth in the opinion of the Arizona Supreme Court. See, Appendix A. What follows below are those facts essential to a determination of

[1] Petitioner's present execution date is July 20, 1983

the legal issues raised herein.

The instant prosecution arises out of the murder of PENELOPE CHENEY in October of 1976. Petitioner and MS. CHENEY had been lovers and lived with one another for several years. To a large degree their relationship centered around their mutual use of heroin. They were both addicts.

On February 9, 1978, Petitioner was convicted by a jury sitting in Tucson, Arizona, of first degree murder. Thereafter, on April 14, 1978, in accordance with the bifurcated procedures set forth in A.R.S. Sec. 13-454 (now Sec. 13-703), Petitioner was sentenced to death.

The trial court judge followed the procedures set forth in the Arizona death penalty statute. The statute requires a separate sentencing trial before the trial judge. The court was required under the then existing statute to return a special verdict setting forth its findings as to the existence or nonexistence of statutorily listed aggravating and mitigating circumstances. The statute called for the court to impose a sentence of death if the trial judge had found one or more aggravating circumstances and that there were no mitigating circumstances sufficiently substantial to call for leniency.

The trial judge at Petitioner's first sentencing

trial found the existence of two aggravating circumstances as follows:

> " 3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.
>
> 6. The defendant committed the offense in an especially heinous, cruel, or depraved manner." A.R.S. Sec. 13-703(F)(3)(6)."

The trial judge rejected and refused to find any of the other listed aggravating circumstances set forth in the statute. The judge also found no mitigating circumstances sufficiently substantial to call for leniency and thus imposed the penalty of death.

Thereafter, on October 23, 1979, while Petitioner's appeal was still pending before the Arizona Supreme Court, that court remanded the capital sentencing aspects of the case to the trial court judge for a resentencing (Appendix G). This remand for a second sentencing was prompted by this Court's decision in Locket v. Ohio, 438 U.S. 586 (1978). See also, State v. Watson, 120 Ariz. 44 (1978), cert. denied, 440 U.S. 924 (1979).

The resentencing hearing was conducted before the same judge who had presided over the first sentencing trial and was held on June 20th and July 10th of 1980. At the conclusion of the July 10th hearing, the trial

judge again found the existence of the same two aggravating circumstances as set forth above. The trial judge further found no mitigating circumstances sufficiently substantial to call for leniency and thus reiterated his sentence of death upon Petitioner.

At this second sentencing, Petitioner presented mitigation evidence pertaining to his substantial heroin-induced intoxication at the time of the offense as well as his provocative love/hate relationship with the deceased.[2] Furthermore, the defense presented the testimony of a psychiatrist, Dr. David Gurland, of Tucson, who had known Petitioner as well as the deceased for several years and was familiar with their relationship. Dr. Gurland stressed that Petitioner's intoxicated condition at the time of the offense coupled with his provocative relationship with MS. CHENEY had "markedly impaired" his ability to conform his conduct to societal norms and standards.

Following this resentencing, Petitioner's appeal from his conviction and sentence was reinstated with the Arizona Supreme Court. On appeal, that court set aside the trial court's finding regarding the "grave

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[2] At the time of trial the jury was instructed on voluntary manslaughter as a result of Petitioner's intoxication and his provocative relationship with MS. CHENEY.

risk of death to another person" aggravating circumstance. As to said aggravating circumstance, the court ruled that insufficient facts existed to fit Petitioner's conduct within the statute and that the trial court judge had misapplied it to Petitioner's case.

The Arizona Supreme Court further ruled that the trial judge had committed error in its findings regarding the "especially heinous, cruel, or depraved" aggravating circumstance. Specifically, the court set aside that portion of the trial court's order pertaining to the finding of "cruelty" for the reason that the record clearly revealed that the deceased experienced no pain or torture. In fact, the deceased had been unconscious at the time of the murder.

Regarding the remaining components of said statutory aggravating circumstance, "heinous and depraved", the Arizona Supreme Court stressed that the trial judge had based its ruling upon acts of Petitioner which had occurred substantially after the deceased's demise. On further review of this finding, the court refused to analyze the statutory aggravating circumstance in such terms. Instead, the Arizona Supreme Court advanced a new theory for a finding that the aggravating circumstance applied to Petitioner's case.

In short, that court made a de novo finding of "heinous and depraved" by viewing events immediately

surrounding the murder. Specifically, the Arizona Supreme Court held that Petitioner's acts of "gratuitous violence" to the corpse by slapping it across the face several times in conjunction with his verbal expressions of hatred towards his former lover, (e.g., "a bitch and a dirty snitch"), were sufficient to support that court's determination of "heinous and depraved".

Following the Arizona Supreme Court's opinion herein, Petitioner, in both a motion for rehearing as well as in a separate request for additional briefs and oral argument (Appendix H), urged the Arizona Supreme Court to remand Petitioner's case for a resentencing. Petitioner's request in this regard was premised upon this Court's opinion in Zant v. Stephens, ___ U.S.___, 102 S.Ct. 1856 (1982). These motions were denied (Appendix I).

In addition to the foregoing facts which are pertinent to the capital aspect of Petitioner's case, there is also a Fourth Amendment claim advanced herein. This claim deals with a warrantless seizure by jail authorities of Petitioner's written communications while he was a pretrial detainee in the local Tucson jail. These seizures occurred several months prior to the murder in question and while Petitioner

was detained in jail on drug-related charges. The communication seized was a note authored by Petitioner and intended for another inmate within the jail, the contents of which were highly incriminatory as to the eventual murder of PENELOPE CHENEY.

At the time of the seizure in question, there was no established policy in the jail prohibiting the passage of such notes and in fact detention officers frequently served as messengers. There is no indication that the detention officers ever opened or read such communications. The testimony further revealed that at the time of the questioned seizure, jail authorities had neither probable cause, reasonable suspicion, nor even the slightest hint of criminal activity on the part of Petitioner to support the questioned seizure.

This Fourth Amendment issue was an issue of first impression within Arizona although it had been addressed by numerous state and federal courts across the country. The Arizona Supreme Court rejected Petitioner's Fourth Amendment claim and in so doing ruled contrary to well established caselaw from the Ninth Circuit Federal Court of Appeals.

With appeal to the Arizona Supreme Court having been unsuccessful, Petitioner has now sought a writ of

certiorari from this Honorable Court.

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

Petitioner raised the issue regarding the Arizona Supreme Court's disjunctive, and thus unconstitutionally overbroad, interpretation of the "heinous, cruel, or depraved" aggravating circumstance in his Brief on appeal from his conviction and sentence. Also raised at that time was the Fourth Amendment claim.

The remaining issue presented herein, which concerns whether the Arizona Supreme Court can properly sustain a capital sentence where it has reversed one of the statutory aggravating circumstances and substantially modified another, was raised for the first time by Petitioner in his motion for rehearing following the Arizona Supreme Court's decision. Naturally, this issue could not have been raised prior to that time for Petitioner was obviously unaware of what treatment the Arizona Supreme Court was going to give to the trial judge's finding regarding aggravating circumstances.

The Arizona Supreme Court's judgment of January 6, 1983, together with its denial of the motion for rehearing dated April 5, 1983, clearly rejected Peti-

tioner's claims now raised herein.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ARIZONA SUPREME COURT MAY CONSTITUTIONALLY SUSTAIN PETITIONER'S CAPITAL SENTENCE, ABSENT A REMAND FOR RESENTENCING, WHERE ON APPEAL IT REVERSES ONE OF THE STATUTORY AGGRAVATING CIRCUMSTANCES AND SUBSTANTIALLY MODIFIES THE OTHER.

A. Newly Adopted Arizona Procedure Mandates A Resentencing In Petitioner's Case And Calls For This Court To Grant The Writ.

As set forth above, the Arizona Supreme Court's review of Petitioner's death sentence revealed that of the two aggravating circumstances found by the trial judge one of them was entirely incorrect (grave risk of death to another). As to the remaining aggravating circumstance (heinous, cruel, or depraved) the Arizona Supreme Court further held that the trial judge had substantially misapplied this section by its erroneous finding of "cruelty" and by its insistant focus upon acts of the Petitioner occurring substantially after the murder.

Notwithstanding the Arizona Supreme Court's finding of error as to the trial court's interpretation of the death penalty statute, that court thereafter denied Petitioner's motion for rehearing and request for supplemental briefs in which the remand issue was

raised. In making this request, Petitioner relied upon Zant v. Stephens, __U.S.__, 102 S.Ct. 1856 (1982), on remand, 297 S.E.2d 1 (Ga. 1982), reh'g. in the Supreme Court pending.

However, after rejecting the Zant remand in Petitioner's case, the Arizona Supreme Court did a total "about face" two weeks later regarding this same issue in the case of State v. Gillies, __Ariz.__, No. 5424 (April 19, 1983). In Gillies, the court, on facts virtually identical to Petitioner's, ordered a remand for resentencing citing Zant as authority for such a procedure. See, copy of Gillies supplemental opinion found at Appendix J as well as relevant portions of the Arizona Supreme Court's original opinion in Gillies which had upheld the death penalty, at Appendix K.

Thus, at the outset it now appears that the Arizona Supreme Court has accepted, as part of its construction of the Arizona capital sentencing scheme, the rationale advanced by several of the justices of this Court in Zant. Yet, why that court rejected the remand procedure in the instant case, despite an express request for a resentencing, remains unclear. Because Petitioner's life is clearly at stake and because any number of Arizona capital defendants, both now and in the future, depend upon a definitive pro-

nouncement from this Court regarding the constitutional necessity of a remand, this Court should grant certiorari herein.

Surely, the well established teachings of this Court since Furman v. Georgia, 408 U.S. 238 (1972) call for uniformity in the application of capital sentencing statutes so as to insure against the discriminatory and arbitrary imposition of the ultimate penalty. In order to carry out such dictates, this Court should grant certiorari in this case.

B. This Court's Well Established Eighth Amendment Principles Require A Reversal Of Petitioner's Death Sentence.

The issue of whether a resentencing is constitutionally necessary under the facts presented by the case at bar has, in analogous situations, been thoroughly briefed in at least two cases presently pending before this Court. Zant v. Stephens, supra; and Barclay vs. Florida, ___U.S.___, No. 81-6908, cert. granted (Nov. 8, 1982). Consequently, Petitioner will not reiterate in full detail all of the arguments so ably set forth in those cases but, instead, will simply summarize same. One of the grounds for a remand finds support in this Court's Eighth Amendment jurisprudence.

In Furman v. Georgia, supra, after "focusing on the procedures by which convicted defendants were selected for the death penalty," this Court "concluded that the statutes before it . . . were constitutionally invalid." Gregg v. Georgia, 428 U.S. 153, 179 (1976). The procedural shortcoming identified in those pre-Furman death penalty statutes was that their lack of guidance to the sentencing authority "created a substantial risk that (the death penalty) . . . would be inflicted in an arbitrary and capricious manner." Gregg v. Georgia, supra, 428 U.S. at 188.

In what has now become a well documented history, the legislative response by states across the country to the Furman objections to capital sentencing was to adopt statutes which clearly specified ". . . the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence." Gregg v. Georgia, supra, 428 U.S. at 180. This legislative response abandoned unfettered sentencing discretion in favor of objective, legislatively defined aggravating circumstances designed to guide and focus sentencing determinations. This Court ultimately upheld as constitutional such legislative responses in a series of post-Furman cases. Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); and Gregg v. Georgia, supra.

With the foregoing Eighth Amendment principles in mind, the unique problems posed by Petitioner's sentencing, and the Arizona Supreme Court's review of it, demonstrate that his capital sentence violates the prescription against cruel and unusual punishment. Several reasons support such a conclusion.

First, Petitioner's sentencing judge relied solely upon two aggravating circumstances. We now know that that sentencing judge erred fully as to one such circumstance (grave risk of death) and certainly substantially as to the other (heinous, cruel, and depraved). Thus, it is clearly probable that the sentencing authority's discretion was improperly channeled insofar as it did not rely upon a correct interpretation of statutory aggravating circumstances.

To be sure, no one can retrospectively determine the precise impact of this misapplication of aggravating circumstances upon the sentencing judge's decision in Petitioner's case. However, under such circumstances this Court's reasoning in Gardner v. Florida, 530 U.S. 349, 359 (1977) seems particularly apt:

> "If . . . it is important to use (statutory aggravating circumstances) in the sentencing process, we must assume that in some cases it will be decisive in the (sentencer's) choice between a life sentence and a death sentence."

The risk that the sentencing judge's improper application and consideration of aggravating circumstances was a "decisive" factor in his imposition of the death sentence upon Petitioner requires that his capital sentence be set aside. Surely, the trial judge in Petitioner's case was more prone to impose a capital sentence based upon his erroneous conclusion that two aggravating circumstances existed. Furthermore, the trial court's erroneous finding of two aggravating circumstances undoubtedly made more likely the conclusion that Petitioner's mitigating evidence was outweighed.

Consequently, a remand for resentencing is necessary. Otherwise, it would flaunt the Constitution to affirm Petitioner's death sentence without first requiring a remand ". . . to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the trial court." Eddings v. Oklahoma, 455 U.S. 104, 119 (1982) (O'Connor, J., concurring).

The second constitutional infirmity, from an Eighth Amendment standpoint, with Petitioner's sentence arises out of the Arizona Supreme Court's alleged review of same. This Court has stressed that appellate review of capital sentencing is necessary to insure against the arbitrary and discriminatory imposition of the ultimate penalty. However, in the instant

case, the Arizona Supreme Court, after virtually setting aside the entirety of the trial court's justification for finding of aggravating circumstances, then simply de novo imposed a sentence of death under a wholly new theory.

Such an approach, under the guise of appellate review, goes too far! In fact, such an approach surely travels the road to precisely what this Court's Eighth Amendment teachings guard against, that being the arbitrary and discriminatory imposition of the death penalty.

The Fifth Circuit Federal Court of Appeals dealt with a similar issue in the case of Henry v. Wainwright, 661 F.2d 56 (5th Cir. 1981) wherein it stressed:

> " Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by reviewing court in which it tries to discern whether the improper . . . aggravating factors exerted a decisive influence on the sentencing determination. The guarantee against cruel and unusual punishment demands more." 661 at 59-60.

The propriety of the Arizona Supreme Court's review of Petitioner's capital sentence has also been addressed in an analogous circumstance by the Eleventh Circuit Federal Court of Appeals in the case of

Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982). There, the Eleventh Circuit stressed:

> " We agree that the rational appellate review of capital sentencing decisions contemplated by Furman and its progeny requires more than mere speculation or conjecture as to what the sentencing tribunal would have decided had it correctly applied the law. Such post hoc justification of a sentencing decision, which depends on a rationale for imposing death distinct from that relied on by the sentencer, cannot fulfill the appellate court's constitutional responsibilities." 685 F.2d at 1269.

So, too, where the Arizona Supreme Court has affirmed Petitioner's death sentence under a rationale ". . . distinct from that relied on by the sentencer . . .", then rational appellate review has been cast to the winds. In essence, then, such an appellate review becomes arbitrary and capricous and runs afoul of the prohibition against cruel and unusual punishment embodied in the Eighth Amendment.

In conclusion, this Court should grant certiorari in the instant case to correct: first, the probability that the sentencing authority's discretion was improperly channeled insofar as its erroneous reliance upon the two aggravating circumstances found; and, secondly, to constrain the type of review authored by the Arizona Supreme Court which, under the guise of ration-

al appellate review, adopted a theory for imposing death distinct from that relied on by the trial court judge. These concerns, as reflected by Zant and Barclay already pending before this Court, merit the granting of certiorari herein.

C. Notions Of Fundamental Fairness Compel The Vacation Of Petitioner's Death Sentence.

Although Eighth Amendment principles suffice to require the invalidation of Petitioner's capital sentence, those principles are firmly bolstered by Fourteenth Amendment due process concepts. This alternative due process argument has essentially served as a parallel ground urged in both Zant and Barclay. As such, Petitioner herein will merely touch upon the constitutional underpinnings of such an argument as well as point out the unique circumstances presented by the case at bar that mandate its application.

The trial judge's sentencing verdict in Petitioner's case was clearly based upon evidence insufficient for a finding beyond a reasonable doubt as to one of the aggravating circumstances (grave risk of death) and certainly most of the remaining aggravating circumstance (heinous, cruel, or depraved). Consequently, the trial court's sentencing verdict was just as unconstitutional as one based on a facially unconstitution-

al statute. Jackson v. Virginia, 443 U.S. 307 (1979).

From this it follows that Petitioner's capital sentence must be set aside as long as the possibility exists that the sentencing authority could have based its sentencing verdict on said unconstitutional factor even though there were other constitutional considerations which he may otherwise have employed. Stromberg v. California, 283 U.S. 359 (1931); Street v. New York, 394 U.S. 576 (1969); and Bachellar v. Maryland, 397 U.S. 564 (1970).

The Stromberg rule, in essence, creates a constitutional due process requirement that a general verdict or judgment resting ambiguously upon a mixture of constitutional and unconstitutional factors simply must be set aside because of the inability of a reviewing court to discern that the unconstitutional factor did not enter into the decision makirg process. This rule applies to general judgments by judges, as in Petitioner's case, as well as to general verdicts by juries. Thomas v. Collins, 323 U.S. 516, 528-29 (1945).

Consequently, because the sentencing verdict in Petitioner's case is hinged upon unconstitutional findings (i.e., improper finding beyond a reasonable doubt as to aggravating circumstances), then the trial judge's sentencing verdict must be set aside and the

instant case remanded for a resentencing.

In addition to the foregoing, Petitioner's case presents a rather unique due process concern turning upon not just the trial court's improper findings regarding aggravating circumstances but, even more offensively, the Arizona Supreme Court's review function. As has been set forth above, the Arizona Supreme Court clearly rejected the trial judge's grounds for the imposition of death. Nevertheless, that court affirmed, in virtually a de novo procedure, the ultimate penalty on a different theory than that advanced in the court below. Such a procedure itself is fundamentally unfair especially where Petitioner's life is at stake. This Court has addressed a similar issue in Presnell v. Georgia, 439 U.S. 14 (1978).

There, the defendant was convicted of rape, kidnapping with bodily injury, and murder with malice aforethought. Thereafter, in the penalty phase of said trial the sentencing authority was instructed that it could impose the death penalty under any one of three circumstances. On appeal, the Supreme Court of Georgia found error in all three interpretations. Nevertheless, it upheld the death penalty on the theory that there was sufficient evidence in the record to justify a death sentence.

This Court set aside the Presnell capital sen-

tence on due process grounds holding that the defendant was entitled to have the validity of his sentence appraised by considering the case as it was tried and as the issues were determined by the trial court. Cf., Cole v. Arkansas, 333 U.S. 196, 201-202 (1948).

Likewise, in the case at bar, due process of law requires that Petitioner not be subjected to the Arizona Supreme Court's de novo application of the death penalty under a theory vastly different from that relied upon by the sentencing authority. It is simply fundamentally unfair for Petitioner to have the validity of his sentence appraised or reviewed in such a manner. Because the Arizona Supreme Court did precisely this, Petitioner's death sentence must now be set aside.

In sum, then, notions of due process of law serve as an alternative ground for a vacation of Petitioner's death sentence under either of two theories: first, the Stromberg line of cases requiring that a general verdict resting upon partially unconstitutionally factors must be set aside; and, secondly, the unique circumstances presented by Petitioner's case which led the Arizona Supreme Court's to outright reject the sentencing authority's basis for a capital sentence and then, in a de novo procedure, apply a different theory to arrive at the same ultimate re-

sult. For all of these reasons, this Court should grant certiorari in the case at bar.

II. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE ARIZONA SUPREME COURT'S DISJUNCTIVE INTERPRETATION IN PETITIONER'S CASE OF AGGRAVATING CIRCUMSTANCE "ESPECIALLY HEINOUS, CRUEL, OR DEPRAVED" IMPLIES A CONSTRUCTION SO BROAD THAT IT CANNOT BE VIEWED AS A MEANINGFUL LIMITATION ON SENTENCER DISCRETION AND THUS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

A.R.S. Sec. 13-703(F)(6) establishes as an aggravating circumstance the following: "The defendant committed the offense in an especially heinous, cruel or depraved manner." The Arizona Supreme Court's construction of said aggravating circumstance has required that it be read literally in the "disjunctive". State v. Clark, 126 Ariz. 428, 436 (1980). Thus, the penalty of death is required where the sentencing authority finds the offense to be either especially heinous, or cruel, or depraved.

In Petitioner's case, the Arizona Supreme Court reversed the trial judge's finding regarding the element of "cruelty" ruling that there was simply no evidence that the victim suffered any pain or suffering. Yet, in the face of this ruling, the Arizona Supreme Court then went on to analyze the remaining components of (F)(6), "heinous or depraved," finding

that those components existed as an aggravating circumstance. It is this finding that serves as the sole predicate for Petitioner's sentence of death.

The Arizona Supreme Court's disjunctive interpretation of section (F)(6), which calls for a capital sentence upon a finding of depravity, is constitutionally infirm as being overly broad and thus it cannot serve to support Petitioner's capital sentence. This Court should grant certiorari to correct such a construction for the reason that "any first degree murder case arguably involves depravity of mind." Gregg v. Georgia, supra, 428 U.S. at 201.

The Arizona court's application of the questioned aggravating circumstance in Petitioner's case does not create a "meaningful basis for distinguishing the . . . cases in which it (death) is imposed from . . . the many cases in which is it not." Lockett v. Ohio, supra, 438 U.S. at 601. Because Arizona makes exceptionally heavy use of capital punishment and because section (F)(6) is frequently utilized to achieve such a result, the issue presented is a significant one and manifestly calls for review by this Court.

This Court dealt with a similar issue in the case of Godfrey v. Georgia, 446 U.S. 420 (1980). Under review in Godfrey was an aggravating circumstance with-

in the Georgia death penalty statutory scheme phrased as follows: "outrageously or wantonly vile, horrible or inhuman."

The plurality opinion in Godfrey conceded that the Georgia Supreme Court had, in its earlier cases of Harris v. State, 230 S.E.2d 1 (Ga. 1976); and Blake v. State, 236 S.E.2d 637 (Ga. 1977), narrowed the possible application of the foregoing aggravating circumstance so that its scope was not so broad as to grant impermissible latitude to the sentencing authority.

This constitutional narrowing had been accomplished by refusing to read said aggravating circumstance in the disjunctive. Thus, the aggravating factor could only apply in situations where there had been "serious physical abuse of the victim before death."

Mr. Justice White's dissent in Godfrey, joined in by Mr. Justice Rehnquist, also emphasized Georgia's narrowing and constitutional construction of the aggravating circumstance in question:

> "It is perfectly evident, moreover, that in exercising its review function, the Georgia Supreme Court understood that the provision applied in its entirety, just as in the past it has insisted that the provision be read as a whole and not be applied disjunctively. Harris v. State, 237 Ga. 718, 230 S.E.2d 1 (1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed. 251 (1977); Holton

> v. State, 243 Ga. 312, 253 S.E.2d 736, cert. denied, 444 U.S. 925, 100 S.Ct. 263, 62 L.Ed.2d 181 (1979). (Again a finding of "depravity of mind" is insufficient to support a death sentence), Godfrey v. Georgia, 446 U.S. at 448. (White, J., dissenting)."

Further on in his dissent, Mr. Justice White returned to the Georgia Supreme Court's rejection of a disjunctive reading of its statute:

> "I see no constitutional error resulting from this (Georgia's) understanding of the provision. Indeed, the Georgia Supreme Court has expressly rejected an analysis that would apply the provision disjunctively (citations omitted), an analysis that, if adopted, would arguably be assailable on constitutional grounds." Godfrey v. Georgia, 446 U.S. at 454. (White, J., dissenting).

Accordingly, both the plurality as well as the dissenting Justices in Godfrey were in total agreement. The aggravating circumstance in question had to be read in its entirety, rather than disjunctively, in order to pass constitutional scrutiny. As such, a majority of this Court in Godfrey adopted Georgia's nondisjunctive "physical harm or torture" theory as a constitutional prerequisite to the imposition of a capital sentence under a statutory aggravating circumstance totally analogous to Arizona's section (F)(6).

Despite the rule announced in Godfrey Petitioner remains on death row, because of his alleged depravity

of mind, even though his victim died instantly and suffered no pain or torture. In such a situation, it is constitutionally irrelevant that Petitioner struck the corpse about the face a few times and verbalized his feelings of hatred toward it.

Surely, if the actual act of striking or killing a live body does not render all first degree murders death penalty cases, then why should a few blows to the corpse magnify the facts such that Petitioner must die rather than live. Obviously, the overwhelming majority of first degree premeditated murderers harbor ill will towards their victim without regard to whether they verbalize those sentiments or not. To impose death upon Petitioner under such circumstances does not provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not. Godfrey v. Georgia, supra, 446 U.S. at 427.

In response to Godfrey, several jurisdictions have limited their analogous aggravating circumstance provision to situations under which an aggravated battery or torture was inflicted upon the victim. The Utah Supreme Court addressed such a situation in the case of State v. Wood, 648 P.2d 71 (Utah 1982) in which it reviewed the aggravating circumstance of "ruthlessness and brutality".

There, the Utah Supreme Court held as follows:

> "Under the rule established in Godfrey, (citations omitted) there was error in the weighing process in this case because the trial court relied on an aggravating circumstance which, without some limitation, is improper. In Godfrey, the Supreme Court set aside a death sentence based on an aggravating factor essentially the same as that relied on by the trial court in this case. . .
>
> Godfrey held that such an aggravating factor had to be narrowed to meet constitutional standards because, as applied, it was so broad as to describe all murders, and because it described all murders, it allowed the jury unlimited discretion in imposing the death penalty. Thus, 'there is no principled way to distinguish this case, in which the death penalty was imposed' from those in which it would not be. (Citations omitted.) Therefore, as to any class of capital murders under Utah law, 'ruthlessness and brutality', as an aggravating factor, must be limited to those murders involving an aggravated battery or torture.
>
> We conclude that the sentencing process was flawed because the aggravating factor relied on was constitutionally impermissible in this case, since it describes all murders and therefore fails to provide any guideline for channeling discretion." 648 P.2d at 85-86.

See also, Ex parte Kyzer, 399 So.2d 330, 334 (Ala. 1981).

Thus, the constitutional rule has become a simple

one: under statutory aggravating circumstances similar to Arizona's (F)(6) a disjunctive interpretation is unconstitutionally overbroad in that only a narrowing construction requiring that the victim suffer pain or torture can salvage the statute.

This Court should grant certiorari herein to insure that the constitutional rule adopted in Godfrey applies to Petitioner's case as well as to all other capital cases throughout Arizona.

III. THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE WARRANTLESS SEIZURES OF PETITIONER'S WRITTEN COMMUNICATIONS, WHILE HE WAS A PRETRIAL DETAINEE AND OCCURRING SEVERAL MONTHS PRIOR TO THE MURDER, VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS WHERE SUCH OFFICIAL SEIZURES WERE NEITHER SUPPORTED BY PROBABLE CAUSE, REASONABLE SUSPICION OR EVEN THE HINT OF CRIMINAL ACTIVITY.

The Fourth Amendment to the United States Constitution provides in pertinent part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." In the instant case, official seizures of a note authored by Petitioner several months prior to the murder and while he was a pretrial detainee on drug-related charges were supported by neither probable cause, reasonable suspicion

or even the slightest hint of criminal activity. The State has never contended otherwise.

Furthermore, and as emphasized by the Arizona Supreme Court in its opinion upholding Petitioner's conviction, at the time of such seizure the jail had no formal written policy dealing with notes between prisoners. In fact, the record revealed that prisoners in the jail frequently exchanged notes with detention officers serving as messengers.

From the foregoing, the clear issue presented for this Court's determination is whether Fourth Amendment guarantees have any application to those persons accused of crimes and incarcerated prior to trial. In essence, do the protections of the Fourth Amendment extend to "persons", such as Petitioner, or are such rights automatically suspended by virtue of their pre-trial detention?

Such an issue is a significant one effecting both the rights of citizens in this Country as well as the orderly administration of jails and prisons. As such, this Court should grant certiorari.

In its opinion upholding Petitioner's conviction, the Arizona Supreme Court addressed Petitioner's Fourth Amendment claim as an issue of first impression in Arizona. In the course of its opinion, the Arizona

court recognized a split of authority on the Fourth Amendment rights of pretrial detainees especially in situations where no jail policies exist dealing with the propriety of inter-prisoner correspondence. Compare, United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982); and United States v. Savage, 482 F.2d 1371 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974) with Thomas v. State, 384 A.2d 772, aff'd., 404 A.2d 157 (Md. 1979); and State v. Matthews, 538 P.2d 637 (Kan. 1975).

While noting the foregoing split in authority, the Arizona Supreme Court opted for the Maryland state court view. In essence, the court simply found that the Fourth Amendment did not apply to official conduct in the jails throughout the State of Arizona.

This Court should resolve the conflict among the lower courts on this issue by granting the cert in Petitioner's case. The better view on this question, and thus the one this Court should adopt, emphasizes the degree to which a pretrial detainee has a reasonable expectation of privacy in an institutional setting. Smith v. Maryland, 442 U.S. 735, 740 (1979).

This expectation of privacy, in turn, depends on the institutional interests at stake as reflected in established policies adopted by the jail or detention center. Where the institution has no established poli-

cies regarding intrusions into an inmate's personal privacy and where there is no reason to expect a written communication to jeopardize legitimate institutional interests, then the Fourth Amendment interest of the inmate should prevail. Thus, under such circumstances, all of which exist in Petitioner's case, the official seizure should be prohibited by Fourth Amendment constraints of "reasonableness".

The recent litigation surrounding the attempted assasination upon President Reagan has produced an opinion dealing with the precise issue presented herein. United States v. Hinckley, supra. There, while Hinckley was being kept as a pretrial detainee certain jail authorities searched his cell including his notes and letters. The institution had failed to adopt any established rules regarding such searches and thus the search was indiscriminate and random at best.

The Hinckley court further found that there was no legitimate institutional interest at stake in searching all private writings of the inmate without an articulated need or suspicion. Accordingly, the court ordered the suppression of the fruits of said search:

> "Because the guards were not acting in accord with an established institutional practice or policy that such reading was necessary to

> maintain institutional or inmate security, there was no reasoned, principled decision by the prison administration entitled to deference. Instead, a serious invasion of Hinckley's right to privacy in his own papers was perpetrated by individual officers unguided by prison rules or even the instructions of their superiors." 672 F.2d at 130-31.

Similarly, the questioned search of Petitioner's written communication, made indiscriminately and without any articulated basis, violated his Fourth Amendment privacy interest. As such, the fruits of that search should have been suppressed in his capital trial.

Another basis for this Court's granting of certiorari turns upon the "finality" of this forum regarding Petitioner's Fourth Amendment claim - this Court is clearly Petitioner's last resort to assert the unlawfulness of the search in question. Cf., Stone v. Powell, 428 U.S. 465 (1976). See also, Mincey v. Arizona, 437 U.S. 385, 402-405 (1978) (Marshall, J., concurring).

As emphasized by Mr. Justice Marshall's special concurrence in Mincey, this Court's failure to grant review in the instant case will lead to anomalous and inconsistent results on the state and federal levels. In short, the Arizona Supreme Court has now ruled that

searches such as occurred in Petitioner's case are lawful whereas the Ninth Circuit Federal Court of Appeals has held similar searches to be unconstitutional. United States v. Savage, supra; and United States v. Vallez, 653 F.2d 403 (9th Cir. 1981). This conflict is the identical conflict posed by Mr. Justice Marshall's opinion and creates the great need for granting the Writ in this case.

> "If certiorari had not been granted, we would have left standing a decision of the State's highest court on the question of federal constitutional law that had been resolved in the directly opposing way by the highest federal court having special responsibility for the State. Regardless of which court's view of the Constitution was the correct one, such nonuniformity on Fourth Amendment questions is obviously undesirable; it is as unfair to state prosecutors and judges - who must make difficult determinations regarding what evidence is subject to exclusion - as it is to state criminal defendants." Mincey v. Arizona, 437 U.S. at 404 (Marshall, J., concurring).

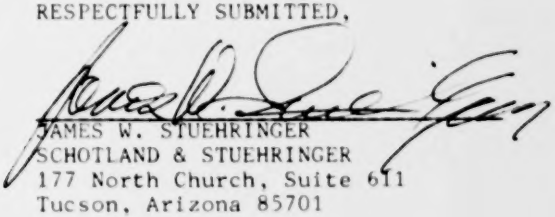
Accordingly, to resolve the above-stated conflict between the Arizona courts and the Ninth Circuit; to prevent such unfairness; and to achieve uniformity on an issue of significant importance, this Court should grant Petitioner's request for Certiorari.

CONCLUSION

The writ of certiorari should be granted.

DATED: June 3 , 1983.

RESPECTFULLY SUBMITTED,



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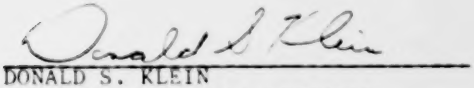

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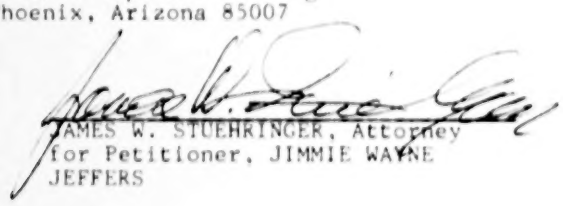
ATTORNEYS FOR PETITIONER,
JIMMIE WAYNE JEFFERS

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition For Writ Of Certiorari To The Arizona Supreme Court have been served this 3rd day of June, 1983, by deposit in the United States Mails, prepaid, to:

ROBERT K. CORBIN
Attorney General
159 State Capitol Building
Phoenix, Arizona 85007



JAMES W. STUEHRINGER, Attorney
for Petitioner, JIMMIE WAYNE
JEFFERS

Appendix A

RECEIVED
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IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

STATE OF ARIZONA,
Appellee,
vs.
JIMMIE WAYNE JEFFERS,
Appellant.

No. 4253

FILED
JAN 24 1983
CLERK SUPREME COURT
BY

Appeal from the Superior Court of Pima County
The Honorable Ben C. Birdsall, Judge
Cause No. A-31934
AFFIRMED

Stephen D. Neely, Pima County Attorney — Tucson
by: D. Jesse Smith, Chief Deputy County Attorney
Michael Pearce (Law Student specially admitted under Rule 28(e), Rules of the Supreme Court of Arizona)
Attorneys for Appellee

Richard S. Oseran, Pima County Public Defender — Tucson
by: Donald S. Klein
Attorneys for Appellant

Schotland & Stuehringer — Tucson
by: James W. Stuehringer
Attorneys for Appellant

Frank P. Leto — Tucson
Attorney for Appellant

HOLOHAN, Chief Justice

Appellant, Jimmie Wayne Jeffers, was found guilty by a jury of first degree murder. Following an aggravation/mitigation hearing, Jeffers was sentenced to death. He now appeals both the conviction and the sentence. We have jurisdiction pursuant to A.R.S. § 13-4031. The judgment of conviction and the sentence are affirmed.

The evidence presented at trial shows that on October 8, 1976, Jeffers was released from jail on an appeal bond following convictions of crimes unrelated to the instant appeal. About a week later he met Doris Van Der Veer at a party given by mutual friends. For the next several weeks Doris lived with Jeffers and became his constant companion.

Doris and Jeffers registered at the Linda Vista Motel in Tucson on October 18, 1976. Jeffers had mentioned his ex-girlfriend Penelope Cheney (Penny) to Doris several times. Doris delivered a note, which Jeffers wrote, inviting Penny to the motel where Jeffers was to provide her with some heroin.

On the day of the murder Jeffers told Doris that Penny was coming over and they wished to be alone. They were going to discuss getting back together. When Penny arrived, Jeffers introduced her to Doris who then excused herself. Doris went to the motel's pool area and sat reading for about an hour and a half when it began to rain. Doris then went to her car and sat inside listening to her CB radio for about half an hour. She then returned to the motel room and knocked on the door. Jeffers admitted her, pointed a gun at her and instructed her to sit in a chair and be quiet.

Upon entering the motel room, Doris saw Penny lying unconscious on the bed. Jeffers injected a fluid into Penny's hand. He began to swear at Penny and said, "I have given her enough **** to kill a horse and this bitch won't die." Doris noticed foam coming from Penny's mouth, which she recognized from her training as a nurse to be a sign of heroin overdose. Doris checked Penny's condition and determined that she was still alive. Doris asked Jeffers if he was going to help Penny and he responded, "No, I'm going to kill her."

Jeffers then removed the belt from around Penny's waist and began to choke her with it. He soon discarded the belt and choked her with his bare hands. Doris urged him to stop saying she would

probably die anyway, to which Jeffers replied, "No, I've seen her this way before and she's come out of it."

After the strangling Jeffers had Doris take Penny's pulse. She found no pulse and reported that Penny was dead. Jeffers then had Doris inject more heroin into Penny and choke her while he took photographs. Jeffers told Doris he did this to have proof that she was an accomplice. Jeffers struck Penny's body several times before Doris helped him put it in the shower stall, where it remained for three days. They then wrapped the body in newspaper and plastic garbage bags, placed it in a sleeping bag and transported it to a secluded spot near Sedona. There they buried it in a shallow grave.

Appellant has raised a number of issues in this challenge to his conviction and sentence. For clarity the issues have been considered in the order in which they occurred in the proceedings in the trial court.

THE JAIL NOTE

Prior to trial, Jeffers moved to suppress two documents: a handwritten note written by him, and a copy of a police report mailed to him while in the Pima County Jail. After a hearing, the court denied the motion, and the items were admitted in evidence. Jeffers contends that the court's failure to suppress this evidence violated his first, fourth, and fourteenth amendment rights.

The evidence at the suppression hearing shows that in August, 1976, before the murder in this case, Jeffers was incarcerated in the Pima County Jail on drug offenses. Jeffers had obtained a copy of a Pima County Sheriff's Office report which stated that in June, 1976, Penny Cheney and another woman had given the sheriff's office information about Jeffers' narcotics connections and his trading drugs for stolen property. Jeffers had underlined the words "Penny Chaney [sic] ... furnished the following information" and wrote beside a list of names on the report, "Patty didn't know any names" and "Penny was only one [sic] that knew this."

On August 21, 1976, Jeffers wrote a note (or "kite" as notes between prisoners are called) to one Bobby Norgard, another prisoner who was in a cell approximately 30 feet away. Jeffers testified that he folded the note two or three times, wrote "Bobby" on the outside, attached a copy of the police report, and asked a detention officer, Officer Cleburn, to deliver it to Norgard. After taking the note, Cleburn read it and turned it over to his supervisor. The note offered Norgard "some quick cash" if when he got out of jail he would get rid of Penny and "Fat Boy" (identified at trial as Richard Honton). The note read in part:

> Name your price and it will be paid the day after it is in the papers. I want to do it myself but I am not sure they will set bond. If they do it will take a couple of months. I am in a hurry. I don't want her to get out of town. An O.D. would be find. Nice & clean.

Jeffers, another prisoner, and Officer Cleburn testified at the suppression hearing. Their testimony established that the prisoners in the Pima County Jail frequently exchanged notes with detention officers serving as messengers. Officers would usually agree to pass the notes unless they were so busy that it was inconvenient for them to go to the recipient's cell. Jeffers and the other prisoner testified that although each had sent numerous notes, neither one had ever seen any officer open or read the note.

At that time the jail had no formal written policy dealing with notes between prisoners; however, published jail rules provided that incoming United States mail was regularly opened to check for contraband. Jeffers testified that he did not expect or intend that Officer Cleburn would read the note.

Jeffers contends that the officer's reading his note was an unreasonable search which infringed his reasonable expectation of privacy in the note, and therefore concludes that his fourth amendment rights were violated and the note should have been suppressed. Prisoners do retain some fourth amendment rights even though incarcerated. United States v. Lilly, 576 F.2d 1240 (5th Cir. 1978); Sostre v. Preiser, 519 F.2d 763 (2d Cir. 1975);

Bonner v. Coughlin, 517 F.2d 1311 (7th Cir. 1975). Jeffers argues that because the jail had no published rules prohibiting note passing and because previous notes had been delivered intact, he reasonably expected this note to remain private.

The application of the fourth amendment depends on whether the person invoking its protection can claim a justifiable, reasonable, legitimate expectation of privacy that has been invaded by the challenged governmental action. Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967); United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982).

Prison officials may inspect and examine the communications of inmates without depriving them of their constitutional rights. Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963, _____ L.Ed.2d _____ (1974); Denson v. United States, 424 F.2d 329 (10th Cir. 1970), cert. denied, 400 U.S. 844 (1970). When an inmate voluntarily writes a letter and gives it to a guard for delivery to another inmate, he cannot reasonably expect the letter to remain private. State v. Matthews, 217 Kan. 654, 538 P.2d 637 (1975); Thomas v. State, 39 Md. App. 217, 384 A.2d 772 (1978), aff'd, 285 Md. 458, 404 A.2d 257 (1979); State v. Johnson, 476 S.W.2d 516 (Mo. 1972), cert. denied, 409 U.S. 859 (1972); Hicks v. State, 480 S.W.2d 357 (Tenn. Cr. App. 1972); State v. Copeland, 15 Wash. App. 374, 549 P.2d 26 (1976). Once prison officials have a right to examine such messages, no rule requires them to close their eyes to what they discover therein. State v. McCoy, 270 Or. 340, 527 P.2d 725 (1974).

Appellant contends that the cases which have allowed notes from prisoners to be used by the state involved instances in which the prisons had published regulations allowing prison officials to intercept and read inter-prisoner communications. We observe, however, that Thomas v. State, supra, is a case in which the prison had no published rules concerning the inspection of notes passed

between prisoners. The defendant in Thomas sought on Fourth Amendment principles to suppress the use of the contents of a note which he, as a pretrial detainee, had sought to have delivered to a fellow prisoner. The note had been placed in a sealed envelope and handed to a detention officer for delivery, but the officer opened the envelope and read the contents.

The Court of Appeals of Maryland in its decision conceded that it could not say that the defendant knew or should have known that the envelope would be opened and its contents read. The Maryland court reasoned that merely because inmates may retain a degree of fourth amendment protection with respect to some matters, it does not necessarily follow that the defendant had a reasonable expectation of privacy in the contents of the envelope. However, even assuming that he had some justifiable expectation of privacy in the note so that the fourth amendment was involved in the search, the court found that the search was reasonable under the circumstances and the fourth amendment was not violated. As the court observed:

> Although we believe that it would be preferable for jails ... to inform inmates, by regulation, posted notice or otherwise, concerning inspection of inmate to inmate correspondence, nevertheless, whatever privacy expectations the defendant Thomas may have had regarding the sealed envelope were outweighed by the legitimate security needs of the detention center. The absence of a regulation covering the matter does not, in our judgment, make the inspection and reading of correspondence from one inmate to another an unreasonable search under the Fourth Amendment.

Thomas v. State, 285 Md. 485, ____, 404 A.2d 257, 263 (1979). We agree with the Maryland court's reasoning. Any jail by its very nature must be concerned with the security of its inmates and with the prevention of criminal activities within its confines.

Jeffers also argues that his first amendment rights were violated, citing Procunier v. Martinez, 416 U.S. 396, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974); Guajardo v. Estelle, 580 F.2d 748 (5th Cir. 1978); and Navarette v. Enomoto, 536 F.2d 277 (9th Cir. 1976), for the proposition that prisoners retain their first amendment rights. The cited cases deal with the first amendment rights of parties

outside the prisons to receive mail from within the prison.

> While First Amendment rights of correspondents with prisoners may protect against the censoring of inmate mail, when not necessary to protect legitimate governmental interests, see Procunier v. Martinez, [supra], this Court has not yet recognized First Amendment rights of prisoners in this context. [citations omitted] Furthermore, freedom from censorship is not equivalent to freedom from inspection or perusal.

Wolff v. McDonnell, 418 U.S. 539, 575-76, 94 S.Ct. 2963, 2984, 41 L.Ed.2d 935, _____ (1974).

We find no violation of appellant's rights in the state's use of the note attempted to be passed in the county jail.

EVIDENCE OF ESCAPE

Prior to Jeffers' October, 1976 release from jail on an appeal bond, he was convicted in state court of receiving stolen propery. A 12-year prison sentence was imposed. Jeffers was also convicted on four counts of federal firearm violations for which he received a 20-year prison sentence. In February, 1977, Jeffers was arrested and charged with the murder of Penny Cheney. While awaiting trial on the homicide charge Jeffers was kept in custody at the Pima County Jail. On September 27, 1977, Jeffers and his cellmate, Robert Butcher, escaped from jail and remained at large for approximately 24 hours before their recapture.

Prior to trial in the instant case, appellant's counsel filed a motion in limine to preclude any reference at trial by state's witnesses to appellant's escape from the Pima County Jail. The motion was denied and evidence of the escape was elicited from Jeffers on cross-examination over objection.

The law is clear that escape constitutes an exception to the general rule that evidence of a crime by the accused, entirely distinct from that for which he is on trial, is neither relevant nor admissible. State v. White, 101 Ariz. 164, 416 P.2d 597 (1966). The reason for this exception is that escape is a fact which may indicate a consciousness of guilt of the underlying offense and

therefore, it is admissible. State v. Wilcynski, 111 Ariz. 533, 534 P.2d 738, cert. denied, 423 U.S. 873, 96 S.Ct. 141 (1975); State v. White, supra. Appellant argues that because it was possible that he escaped for reasons other than a consciousness of guilt of the murder charge, such as to avoid the combined 32-year prison sentences, the escape did not convey an unequivocal inference of consciousness of guilt. This ambiguity, he argues, renders the escape irrelevant to the murder charge.

We recognize that authority exists in other jurisdictions that "the circumstances must be such as to exclude every reasonable hypothesis except that of the defendant's guilt of the offense charged," in order for the fact of escape to be admissible at trial. State v. Crawford, 201 P. 1030 (Utah 1921). See United States v. Myers, 550 F.2d 1036 (5th Cir. 1977); Damron v. State, 58 Tex. Crim. 255, 125 S.W. 396 (1910). There is more recent authority which indicates that evidence of escape may be introduced in a criminal case, despite multiplicity of pending charges. Johnson v. State, 312 A.2d 630 (Del. Supr. 1973); State v. Guinan, 506 S.W.2d 490 (Mo. App. 1974); State v. Hudson, 491 S.W.2d 1 (Mo. App. 1973); Archie v. State, 488 P.2d 622 (Crim. App. Okla., 1971); Chapple v. State, 528 S.W.2d 62 (Crim. App. Tex. 1975); State v. Piche, 71 Wash. 2d 583, 430 P.2d 522 (1967), cert. denied, 390 U.S. 912.

The admissibility of evidence of an escape is not determinative of the weight to be afforded to that fact, and the accused may go forward with the evidence to explain any alternative reasons he may have had for the escape. State v. White, 101 Ariz. 164, 416 P.2d 597 (1966). Jeffers did not attempt to explain why he waited until his incarceration on this offense to flee from the prison terms imposed rather than run when he was released from jail nearly a year before, but he was not denied the opportunity to present an explanation.

We hold that the existence of unserved sentences or unrelated criminal charges pending at the time of the escape did not render

evidence of Jeffers' escape inadmissible. Rather, the existence of alternative reasons for the escape goes to the weight of the evidence and not to its admissibility. State v. White, supra; accord, Archie v. State, supra; State v. Piche, supra. There was no error in the trial court's admission of evidence of Jeffers' escape from the Pima County Jail.

JAIL CLOTHING

On the first day that evidence was presented to the jury, Jeffers appeared in court wearing Pima County Jail clothing. The clothing consisted of a short-sleeved blue shirt and dark blue pants. Jeffers wore civilian clothes throughout the rest of the lengthy trial.

Jeffers claims that the appearance in jail garb denied him the right to be presumed innocent, in contravention of the due process clause of the fourteenth amendment.

A state cannot compel an accused to stand trial before a jury in identifiable prison clothes. Estelle v. Williams, 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). In order to run afoul of the proscription in Estelle, Jeffers' appearance in court in jail clothes must have been compelled by the state against his will. See Bentley v. Crist, 469 F.2d 854 (9th Cir. 1972). Jeffers does not deny that he was given the opportunity to wear his street clothes in court and chose not to wear them. Rather, Jeffers claims that his choice to forego donning street clothing was involuntary because he was awakened several times during the previous night by jail personnel. We cannot agree that Jeffers was so tired or sick that he was unable to make the voluntary election to appear in court wearing jail clothes. From Jeffers' own testimony we calculate that he slept well over ten hours. During this time he endured six interruptions, most of which kept him awake only momentarily. These unfortunate interruptions fall short of coercion capable of overbearing Jeffers' will. We find no support in the record for the contention that Jeffers' choice to refuse street clothing was anything but an intentional relinquishment of a known right.

EVIDENCE OF ASSAULT

Appellant Jeffers urges that the evidence of prior bad acts was introduced to prove his character as a "bad man" in violation of rule 404(b), Arizona Rules of Evidence. He urges that the prior assaults were not sufficiently similar to the assault on Doris or the murder of Penny to show any characteristic method, plan, or scheme, and he contends that the prejudicial effect far outweighed any possible relevance this evidence might have. He cites rule 403, Arizona Rules of Evidence, 17A A.R.S.

The evidence challenged by the defense was presented by Sharon Galarza, a prosecution witness. She testified that she had received a grant of immunity from pending criminal charges against her in return for her testimony against Jeffers. She testified that she had lived with Jeffers from late 1975 to May 1976 and had met Penny Cheney during that period. Sharon, Penny, and Jeffers were all using heroin then. Sharon was arrested for selling heroin in October, 1976, and apparently released soon afterwards. On November 6, 1976, she had a telephone conversation with Jeffers in which she told him that she had thought at first that Penny had been involved in her arrest, but later found she was mistaken. She testified that Jeffers then told her, "Well, nobody has to worry about her anymore. She's gone .... I killed her .... I just got tired of her ***." He said that he had proof that Penny had snitched on him. He invited Sharon to his room at the Thunderbird Motel for some heroin, adding that he was living with a woman whom he had forced to help him with the killing and that Sharon should not mention the killing to the woman because "she wouldn't appreciate if anyone knew." Sharon went to the motel, saw Jeffers, and met Doris. The next day Jeffers and the woman known as "Dirty Mary" went to Mexico to buy heroin. The woman stole Jeffers' money. Sharon telephoned Jeffers the following day, and he invited her to the motel for a share of the heroin. When she arrived, Jeffers and Doris were alone in the room. Jeffers locked the door, pulled the drapes, and assaulted Sharon, holding a large butcher knife to her throat and accusing her of ripping him off. He then forced Sharon to inject herself with a substance which she feared was poison,

but was in fact heroin. At one point Sharon managed to catch Doris' eye and Doris smiled reassuringly, as if to indicate that the drug was not poisoned. On the day following this incident, Sharon saw Jeffers assault Roger Valery, accusing him of conspiring with Dirty Mary. Jeffers threw him onto a bed, held a gun between his eyes, and threatened to kill him.

Sharon also testified that during the first few days she lived with Jeffers, he told her of two prior assaults on Penny Cheney when he thought Penny had stolen some jewelry from him. Once Jeffers tried to overdose Penny, and once he chased her with an axe, chopped up a stereo, and chased her out a window.

On cross-examination, the defense attacked Sharon's character by eliciting testimony that she was a prostitute and a heroin addict and dealer. Sharon did not report what Jeffers had said and done to anyone until shortly before she was to go to trial on heroin and prostitution charges in mid-January 1977. She then told her attorney, who notified the county attorney's office. The defense questioned Sharon about why she had not come forward with this information earlier, implying that she had fabricated the story to avoid prosecution.

On redirect, Sharon testified that she did not inform the authorities immediately because "I just wanted to put it out of my head. I was scared. I didn't want to think about it." She finally told her attorney about Jeffers because she heard from a friend that "a white man with real fuzzy hair" had been looking for her, and "I thought it was Mr. Jeffers and it scared me." She related that Jeffers had beaten and choked her, held a gun to her head, and tried to overdose her while she lived with him, and that she feared reprisals if he caught up with her.

The list of "other purposes" in rule 404(b), for which other crime may be shown, is not exclusive; if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts. State v. Tuell, 112 Ariz. 340, 541 P.2d 1142 (1975); State v. Thompson, 110 Ariz. 165, 516 P.2d 42 (1973); State v.

Jones, 26 Ariz. App. 68, 546 P.2d 45 (1976); see also United States v. Barrett, 539 F.2d 244 (1st Cir. 1976). The trial judge must determine whether the probative value of the disputed evidence is outweighed by the danger of unfair prejudice; if so, the evidence should be excluded. United States v. Longoria, 624 F.2d 66 (9th Cir. 1980); State v. Hays, 17 Ariz. App. 202, 496 P.2d 628 (1972). The trial judge has considerable discretion in determining whether to admit evidence of other crimes and need not explain the basis for the decision to admit such evidence. So long as the decision is supported by the facts before the court, we will affirm the trial court's decision unless a clear abuse of discretion appears. State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 101 S.Ct. 796 (1980); State v. Aguirre, 130 Ariz. 54, 633 P.2d 1047 (App. 1981).

Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible. State v. Mosley, 119 Ariz. 393, 581 P.2d 238 (1978); State v. Torres, 27 Ariz. App. 556, 556 P.2d 1159 (1976). In Torres, the defendant threatened the witness, who then corroborated his false story. The court of appeals stated that:

> [A]ppellant's prior misconduct explained [the witness'] fear of him which caused her to tell a false story. Under these circumstances, where the prior misconduct had independent relevancy for some purpose other than showing a probability that appellant committed the crime for which he was being tried, it was properly admitted. Udall, Arizona Law of Evidence, Sec. 115.

Id. at 559, 556 P.2d at 1162. We believe that the evidence of Jeffers' assaults upon Sharon and others explained the fear Doris and Sharon felt for Jeffers and their reasons for failing to report the murder at once. The evidence helps counter the defense's insinuation that Sharon had fabricated the story to gain immunity.

The evidence was relevant for the purpose of bolstering these witnesses' credibility, and we find no abuse of discretion by the trial judge in admitting the evidence despite its prejudicial nature. The jury was given a proper limiting instruction stating that evidence of other crimes could not be considered to prove Jeffers' bad character or any disposition to commit crimes. We find no error in the admission of this evidence.

PRIOR MURDER ATTEMPT UPON THE VICTIM

Appellant challenges the admission of evidence of what counsel have styled a prior murder attempt upon the victim, produced at trial in the form of the victim's hearsay statements. Edith Meck, manager of the apartments in which Jeffers lived, and Lillian Ramirez, a nurse at the Tucson Medical Center testified about contacts they had with the victim, Penny Cheney, approximately 11 months before her death. Mrs. Meck was permitted to describe to the jury an incident in which she observed Penny running from the direction of Jeffers' apartment, screaming for help. Mrs. Meck said Penny was cut on the hand and had left a trail of blood along the sidewalk where she ran. When Penny approached Mrs. Meck, she cried out that Jeffers had "doped her and threw her out the bedroom window." Mrs. Meck described Penny's condition as "very excited," and said her speech was difficult to understand. Penny's eyes "looked very funny" and she leaned on Mrs. Meck "as though she couldn't hardly stand up." Later that day Mrs. Meck observed Jeffers' bedroom window to be broken.

Soon after her encounter with Mrs. Meck, Penny was taken by ambulance to the Tucson Medical Center Emergency Room. There she met Nurse Lillian Ramirez who obtained and charted information to aid the doctor in Penny's diagnosis and treatment. Nurse Ramirez determined that Penny had sustained injuries to her right hand and left leg. The nurse testified that Penny was semi-stuporous and pale, that she had slow respiration, slurred speech, and pinpoint pupils that did not react to changes in light levels. Nurse Ramirez asked Penny what happened to her and Penny responded "that she had been drugged by her boyfriend, that friends were coming to help kill her and she had jumped [from a window] to get away." Penny refused to answer the nurse's question about what drug had been given her saying, "I don't know. I don't want him to get in trouble." Nurse Ramirez testified that Penny was eventually diagnosed and treated with narcan, which is used to counteract the effects of a narcotic on a patient.

Appellant makes three separate attacks upon the admission of the statements of Penny Cheney. First, Jeffers contends the incident constitutes a prior bad act which is inadmissible under rule 404(b), Arizona Rules of Evidence, 17A A.R.S. Jeffers also claims the statements are hearsay, not properly admissible under any exceptions listed in rule 803. Finally, Jeffers challenges the statements' admission as a denial of his sixth amendment right to confrontation.

a. PRIOR BAD ACT

Rule 404(b) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

We have long held that where the existence of premeditation is in issue, evidence of previous quarrels or difficulties between the accused and the victim is admissible. Sparks v. State, 19 Ariz. 455, 171 P.1182 (1918); Leonard v. State, 17 Ariz. 293, 151 P.947 (1915). In Leonard we upheld the admission of evidence of trouble between the defendant and the victim four years before the homicide there at issue. Id.

The admissibility of such testimony is not measured by remoteness in time. Rather, the length of time is a factor to be considered by the jury in determining the weight of the evidence. State v. Moore, 111 Ariz. 355, 529 P.2d 1172 (1974).

Evidence of prior trouble between the victim and the accused derives its relevance from the fact that the existence of prior ill will toward the victim not only renders the commission of the crime more probable, but tends to show the malice, motive or premeditation of the accused. Leonard v. State, supra, State v. Denny, 27 Ariz. App. 354, 555 P.2d 111 (1976).

Evidence of this prior bad act, taken together with the expression in Jeffers' intercepted jail note of his desire to kill Penny by

heroin overdose, shows a continuing state of mind from which the jury could properly infer that Jeffers carried out his desire. See State v. Moore, supra.

Furthermore, Jeffers professed a deep abiding love for Penny which would not allow him to cause her any harm. The opening statement for the defense made several references to this love Jeffers had for Penny. Thus, evidence of this prior incident would also be admissible to rebut Jeffers' claim of inability to harm his loved one. See also, State v. Denny, supra (evidence of defendant's prior assault on homicide victim admissible to rebut claim of victim's personal abuse of defendant).

In addition to relevance, admission of prior bad act evidence requires sufficient indicia of its reliability. State v. Gause, 107 Ariz. 491, 489 P.2d 830 (1971), vacated on other grounds, 409 U.S. 815 (1972). In Gause we stated that "[a] bald expression of fear by a murder victim standing alone does not have sufficient reliability to be admitted." Id. at 495, 489 P.2d at 834. Penny's statements need not stand alone in reflecting their reliability to render Penny's statements admissible. The substance of the statements is that Penny went through a window somehow because Jeffers drugged her and threatened her. Her statement was corroborated by her fresh cuts, and the trail of blood and broken window. That she had been drugged was corroborated by her demeanor, appearance, and treatment with narcan. The fact that the doctor's diagnosis and Penny's refusal to reveal what drug was used because she did not "want to get [Jeffers] in trouble," lends further reliability, because her protective attitude toward Jeffers suggests that she did not fabricate his involvement with her injury.

Jeffers argues that the discrepancy between the statements as related by the two witnesses regarding whether Penny jumped or was thrown through the window strips the statements of their reliability and renders them inadmissible. We do not agree. This discrepancy is minor and has little impact on what makes the incident relevant to Penny's murder. We hold that the statements are sufficiently reliable and relevant to be properly admissible for the purposes previously stated.

b. HEARSAY

The trial court admitted Penny's statement to Mrs. Meck under the excited utterance exception to the hearsay rule. Rule 803(2) of the Rules of Evidence defines excited utterance as "A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Three requirements must be met for the proper admission of an excited utterance under this exception to the hearsay rule: (1) there must have been a startling event; (2) the statement must relate to the startling event; and (3) the statement must be made spontaneously, that is, soon enough after the event so as not to give the declarant time to fabricate. State v. Barnes, 124 Ariz. 586, 606 P.2d 802 (1980); State v. Woolery, 93 Ariz. 76, 378 P.2d 751 (1963).

Jeffers argues that the statement fails to satisfy two of the above requirements and was, therefore, improperly admitted. In that regard, Jeffers claims that the statement related to the unreliable perceptions of a declarant under the influence of an intoxicating drug rather than the startling event itself; and secondly, that the statement lacked the requisite spontaneity.

The law is clear that this court will not reverse the trial court's ruling under the excited utterance exception to the hearsay rule absent a clear abuse of discretion. State v. Dale, 113 Ariz. 212, 550 P.2d 83 (1976); State v. Kevil, 111 Ariz. 240, 527 P.2d 285 (1974); State v. Hughes, 120 Ariz. 120, 584 P.2d 584 (App. 1978).

The basis for the exception is that the event produces nervous excitement making fabrication unlikely. State v. Peeler, 126 Ariz. 254, 614 P.2d 335 (App. 1980). Our courts have not attempted to confine the application of the excited utterance exception solely to indisputably reliable statements. In Peeler, supra, the exception was applicable even though evidence was presented that statements made by the victim would probably be less reliable during periods of extreme agitation. Similarly, in State v. Yee, 121 Ariz. 398, 590 P.2d 937 (App. 1979), the declarant's statements were admitted even though his wife testified that her husband was particularly unreliable when he became excited and that she distrusted the statements in question. Admission as a hearsay exception is not fore-

closed by the fact that a statement's reliability has been impugned. Id.

The record leaves no room for doubt that Penny was under the influence of a narcotic drug at the time she made the statement, "He drugged me." Jeffers contends that the fact of intoxication plus the inconsistency between Penny's two statements establish that the statements resulted from the drug's effect rather than the excitement of the startling event. Mrs. Meck testified that despite Penny's difficulty with her coordination, she appeared to be very excited, and although she was hard to understand, Penny seemed to know what she was talking about.

Jeffers would have us declare Penny's statements to be so inherently unreliable that exclusion is the only cure. This we decline to do. It is unquestionable that the use of drugs may have a deleterious effect on one's ability to perceive and communicate. See State v. Ballesteros, 100 Ariz. 262, 413 P.2d 739 (1966). Nevertheless, a witness is not rendered incompetent to testify merely because he was under the influence of drugs at the time of the incident about which he is testifying or at the time he testifies. Ballesteros, supra; Wilson v. United States, 232 U.S. 563, 34 S.Ct. 347, _____ L.ED. _____ (1913) (witness on morphine at time testified). See, State v. Reyes, 99 Ariz. 257, 408 P.2d 400 (1965) (by implication); State v. Arriola, 99 Ariz. 332, 409 P.2d 37 (1965) (by implication). The question of reliability here, just like the question of competency, is within the sound discretion of the trial court. In both instances the question of credibility remains for submission to the jury.

We find Jeffers' argument that the statement was not made soon enough after the startling event to possess the requisite spontaneity to be without merit. Penny ran approximately two blocks from Jeffers' apartment to Mrs. Meck's office, where she made the statement in response to Mrs. Meck's question, "What happened?" Penny was still bleeding from a fresh cut that she presumably incurred during the startling event of being drugged and going through a window. Penny remained in Mrs. Meck's office only ten to fifteen minutes before

an ambulance arrived. The totality of the circumstances indicate that Penny was under the stress and excitement caused by the startling event when she made the statement. See generally State v. Barnes, supra; State v. Morrow, 108 Ariz. 108, 493 P.2d 119 (1972); State v. Perry, 116 Ariz. 40, 567 P.2d 786 (App. 1977). The trial court did not err in admitting it.

The trial court admitted Penny's statement to Nurse Ramirez under the medical diagnosis exception to the hearsay rule. Jeffers maintains that this was error.

Rule 803 excepts from the hearsay rule statements made for purposes of medical diagnosis or treatment. Subsection 4 of the rule defines such statements. It provides:

> Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

Arizona's adoption of this rule verbatim from the federal rule significantly broadened the scope of admissible patient to physican hearsay statements. Udall and Livermore, Arizona Practice: Law of Evidence, § 129 (2d ed. 1982) (hereinafter, Udall).

Two important factors derive from the rule's rationale: (1) whether the declarant's motive is consistent with receiving medical care; and (2) whether it is reasonable for the physician to rely on the information in diagnosis or treatment. United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980). Thus in Iron Shell, the court admitted an assault victim's statements to her doctor stating: "It is important to note that the statements concern what happened rather than who assaulted her. The former in most cases is pertinent to diagnosis and treatment while the latter would seldom, if ever, be sufficiently related." Id. at 84. Accord, United States v. Nick; 604 F.2d 1199 (9th Cir. 1979). The Advisory Committee's Note to rule 803(4) also makes a point of illustrating that statements as to fault would not ordinarily qualify under the exception.

In the instant case Nurse Ramirez testified that who administered the narcotic was not reasonably pertinent to diagnosis or treatment.

Furthermore, Penny's motive to provide information for treatment must be regarded with suspicion because of her refusal to name the drug used on her. Penny's statement fails to satisfy either prong of the test and should not have been admitted into evidence under the medical diagnosis exception to the hearsay rule.

The state urges other grounds for the statement's admission; excited utterance, expression of present state of mind, or expression of fear by a murder victim. We find none of these to except Penny's statement to Nurse Ramirez from the hearsay rule. First, Penny's reflective capabilities, as illustrated by her refusal to disclose what drug was used, remove the statement from the excited utterance category because the declarant's ability to fabricate is apparent. Secondly, we perceive no significant difference between an expression of fear by a murder victim and an expression of state of mind under rule 803(3). Both exceptions require that the statement show some state of mind which is relevant to the issues involved in the criminal proceeding. See State v. Ramirez, 116 Ariz. 259, 569 P.2d 201 (1977); State v. Gause, 107 Ariz. 491, 489 P.2d 830 (1971), vacated on other grounds, 409 U.S. 815 (1972). Penny's state of mind at that remote date would be of questionable relevance to any issues at trial. Thus, admission under the state of mind exception would not have been proper.

Although we find error in the admission of the second statement, we conclude that such error was harmless. The statement indicated that Penny was drugged by Jeffers, its content was the same as that of the properly admitted statement to Mrs. Meck. This repetition, although error, was not prejudicial. State v. Woolery, 93 Ariz. 76, 378 P.2d 751 (1963). The second part of the statement to Nurse Ramirez to the effect that Penny jumped from the window to get away from friends that were coming to kill her, does not incriminate Jeffers and is not prejudicial. If anything, the contradiction between this statement and the first had the potential to benefit Jeffers' case.

c. RIGHT TO CONFRONTATION

Appellant asserts that introduction into evidence of Penny's hearsay statements denied him the right to confrontation guaranteed by the sixth amendment and made applicable to the states through the fourteenth amendment. Pointer v. Texas, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). A literal reading of the confrontation clause would require the exclusion of any statement, however relevant, made by a declarant who was, for any reason, absent from trial. Such a reading has long been rejected as unintended and too extreme. Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980).

The primary concern of the confrontation clause is to assure that the jury has an adequate basis upon which to evaluate the truth of the statement. Dutton v. Evans, 400 U.S. 74, 91 S.Ct. 210, _____ L.Ed.2d _____ (1970). Cross-examination, although preferred, is not the sole method by which the confrontation clause may be satisfied. Absent cross-examination, the essential issue is whether under all of the circumstances, the hearsay statement has a high degree of reliability. United States v. Nick, 604 F.2d 1199 (9th Cir. 1979).

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. (emphasis added) Ohio v. Roberts, 448 U.S. 56, 66, 100 S.Ct. 2531, 2539, 65 L.Ed.2d 597, _____ (1980).

There is little doubt that the excited utterance qualifies as a firmly rooted hearsay exception, see 6 Wigmore, Evidence § 1746 (Chadbourn rev. 1976), and generally any evidence that falls within such an exception would for that reason alone satisfy the reliability requirement. In addition, much of what Penny stated was corroborated by independent evidence. The appellant's right to confrontation was not violated.

NEGATIVE EVIDENCE

Central to Jeffers' defense was his testimony that he was not present when Penny Cheney died, but was at or en route from Danny's Hideaway Bar in South Tucson at the time. In that regard Jeffers testified as follows. Penny Cheney arrived at the motel room in which Jeffers and Doris Van Der Veer had been living at approximately 11:00 A.M. on the day she died. At Jeffers' request Doris left immediately and did not return until between 1:00 and 2:00 that afternoon. The three of them remained in the motel room for 30 to 45 minutes when Jeffers left to attempt to purchase some heroin. Jeffers went to Danny's Hideaway, which is about a 30-minute drive from the motel. After spending a few hours in the bar, Jeffers met a man who agreed to help him in the purchase of heroin. He accompanied this man out of Danny's Hideaway at 5:30 or 6:00 that evening. Upon his return to the motel room at 7:00 P.M., Jeffers discovered Penny Cheney, already dead, lying on the bed and Doris Van Der Veer sitting quietly in a chair nearby. In sum, Jeffers' testimony places his arrival at Danny's Hideaway no earlier than 2:00 and as late as 3:15 on October 21, 1976.

In order to rebut Jeffers' testimony, the state called Sharon Galarza to the stand to testify that she was in Danny's Hideaway on October 21, 1976 from about 12:30 P.M. to sometime between 2:30 P.M. and 3:00 P.M. Galarza testified that she knew Jeffers at the time, but she did not see him at Danny's that day. She testified that she remembered that day because it was the day she was arrested on a sale of narcotics charge.

Jeffers challenges the trial court's admission over objection of Galarza's rebuttal testimony in that it constituted negative evidence which lacked sufficient foundation to give it probative value.

The acceptance or rejection of negative evidence is largely a matter of discretion for the trial court. State v. Kelly, 111 Ariz. 181, 526 P.2d 720 (1974). The general rule is that negative evidence to the effect that the witness did not see an event occur can rise to the level of probative value only when supported by

a sufficient foundation that the witness' position and attitude were such that he probably would have seen the event had it happened. Byars v. Arizona Public Service Co., 24 Ariz. App. 420, 539 P.2d 534 (1975).

Galarza's testimony concerning her observations of October 21, 1976, if believed, establishes that Jeffers was not at Danny's Hideaway between 12:30 and 2:30 or 3:00 P.M. The testimony indicates that Jeffers was not at the establishment before approximately 3:00 P.M., and it was admissible for that purpose. The appellant could have been at the bar at a later hour, and this is what the defense argued. We find no error in the admission of the evidence.

EXCLUSION OF CONVERSATION

The defense called as a witness Myron McRoberts, a painter who had stayed at the Linda Vista Motel the week of the murder. He testified that on the afternoon of the murder, he saw Doris and a blonde woman leave the motel together in a dark-colored car. He said he remembered the day because it was raining so that he couldn't work, because he and his partner folded their dropcloths behind the motel contrary to their usual practice, because he had gone out drinking the night before and was somewhat hungover, and because he remembered a conversation he had had with Mrs. Wheeler, the manager of the motel. The state objected to the introduction of the content of the conversation on hearsay grounds, and the objection was sustained. The defense offered to prove that Mrs. Wheeler had told McRoberts, "There's a cute blonde in room 7," and that was one reason he identified the particular date.

Appellant contends that the statement was admissible non-hearsay in that the statement was offered not for the truth of the matter asserted, but to show how McRoberts' remembered the day in question. Since the evidence was offered only to prove that the statement had been made, it was not hearsay. State v. Johnson, 106 Ariz. 539, 479 P.2d 424 (1971). The trial court should have allowed the offered testimony.

The error by the trial court is not reversible because the excluded evidence was cumulative. The witness had already described several reasons why he remembered the day, and the excluded testimony merely added an additional reason for remembering the day.

EXCLUSION OF PRIOR CONSISTENT STATEMENTS

Jeffers contends that certain statements of defense witnesses were improperly excluded as hearsay. Three statements are involved; the first was allegedly made by Jeffers to his mother in a telephone call on November 7, 1976, shortly after the murder, to the effect that Penny was dead and that she had overdosed. The defense attempted to introduce this statement through the testimony of Jeffers and of his mother, but hearsay objections were sustained as to both. The second and third statements were allegedly made to William Heuisler, a private investigator, by Myron McRoberts and Dave Birket, respectively, when he first spoke with them about their recollection of the events at the motel. In answer to Heuisler's question whether he remembered anyone from around the motel, McRoberts reportedly stated that he saw a "good-looking blonde" and Birket said he remembered seeing another girl there with tattoos. The defense attempted to introduce these statements through Heuisler's testimony, but the court sustained hearsay objections.

Jeffers argues that the statements were not hearsay because they were prior statements consistent with the declarants' testimony at trial and were offered to rebut express or implied charges of recent fabrication. Rule 801(d)(1)(B), Rules of Evidence, 17A A.R.S., Ray Korte Chevrolet v. Simmons, 117 Ariz. 202, 571 P.2d 699 (App. 1977).

The state points out that the declarants were never impeached upon the particular matters asserted in the prior statements. Thus, because the prior statements did not rebut the alleged fabrications or memory lapses, those statements were not admissible under rule 801(d)(1)(B). See: People v. Mullin, 197 Cal. App.2d 479, 17 Cal. Rptr. 516 (1961); State v. Fleming, 354 Mo.31, 188 S.W.2d 12 (1945). Jeffers' statement that Penny was dead and had overdosed did not rebut the alleged fabrication that Jeffers had not been involved in her death. McRoberts' testimony was not attacked on the question of whether he had ever seen a good-looking blonde around the motel, nor was Birket's testimony attacked on whether he had ever seen a tattooed woman; rather, the challenges were to their recall of the

date and circumstances when they saw the women and the accuracy of their identifications.

With respect to Jeffers' alleged statement, the state urges that because the murder had already occurred when he made the statement, his motive to fabricate had already arisen. Therefore, the statement is inadmissible. United States v. Greene, 497 F.2d 1068 (7th Cir. 1974), cert. denied, 420 U.S. 909, 95 S.Ct. 829, 42 L.Ed.2d 839 (1975); People v. White, 57 App. Div. 699, 393 N.Y.S.2d 615 (1977). The state also contends that the trial judge was within his discretion to exclude the statement as self-serving, because such statements lack trustworthiness. State v. Duffy, 124 Ariz. 267, 603 P.2d 538 (App. 1979).

As to Jeffers' statement, we hold that the trial judge properly excluded it. As for McRoberts' and Birket's statements, we agree that the statements were not in rebuttal of any prior challenged testimony and were properly excluded as hearsay.

IMMUNITY FOR DEFENSE WITNESS

Defense counsel moved at trial for a grant of immunity to a defense witness, Mr. Louie Rosso. The motion was denied. The defense called Rosso to testify at trial, but Rosso claimed his fifth amendment privilege against self-incrimination and refused to answer any questions pertaining to Jeffers or Doris. In their motion for new trial and in the briefs, defense counsel alleged that if Rosso had been granted immunity, he would have contradicted Doris' testimony that shortly before the murder she and Jeffers had purchased such a large quantity of heroin from Rosso that Jeffers would not have had to replenish his supply on the day of the murder. Thus, Jeffers argues that Rosso would have corroborated Jeffers' alibi testimony that on the afternoon Penny Cheney died, Jeffers had left the motel to attempt to buy heroin at Danny's Bar. He also urges that Rosso would have attacked Doris' credibility as a witness in other particulars.

Appellant concedes that this court has repeatedly held that due process does not require that immunity be granted to defense witnesses at the defense's request and that it is a matter for

prosecutorial discretion to decide when the public interest would be best served by a grant of immunity. State v. Verdugo, 124 Ariz. 91, 602 P.2d 472 (1979); State v. Swinburne, 116 Ariz. 403, 569 P.2d 833 (1977); State v. Buchanan, 110 Ariz. 285, 518 P.2d 108 (1974). Nevertheless, he urges that these cases are not controlling because they did not deal with claimed sixth amendment violations.

Appellant contends that the court's failure to grant Rosso immunity denied him his sixth amendment right to compel the testimony of witnesses on his behalf and his rights to due process and a fair trial. He cites and relies heavily upon Government of the Virgin Islands v. Smith, 615 F.2d 964 (3rd Cir. 1980) and State v. Broady, 41 Ohio App.2d 17, 321 N.E.2d 890 (1974). At the outset, we find that Broady is inapplicable to the case at bar, because the Ohio statute did not require that immunity could be granted only on the application of the prosecutor.

We decline to follow the Third Circuit's lead in the Virgin Islands case. A.R.S. § 13-1804, now § 13-4064, explicitly provides that immunity is to be granted at the prosecuting attorney's request and does not authorize the court to grant immunity on its own motion. Additionally, we note that the Virgin Islands case is distinctly in the minority. See, e.g., United States v. Herbst, 641 F.2d 1161 (5th Cir. 1981), and cases cited therein at 1168; United States v. Turkish, 623 F.2d 769 (2d Cir. 1980), and cases cited therein at 772-74. Even the Third Circuit's opinion is divided on this question. Cf. United States v. Rocco, 587 F.2d 144 (3d Cir. 1978). As for Jeffers' sixth amendment claims, we agree with the Second Circuit's reasoning in Turkish, supra at 774:

> [T]he Sixth Amendment's Compulsory Process Clause gives the defendant the right to bring his witness to court and have the witness's non-privileged testimony heard, but does nor [sic] carry with it the additional right to displace a proper claim of privilege, including the privilege against self-incrimination. [citations omitted] While the prosecutor may not prevent or discourage a defense witness from testifying, [citations omitted], it is difficult to see how the Sixth Amendment of its own force places upon

> either the prosecutor or the court any affirmative obligation to secure testimony from a defense witness by replacing the protection of the self-incrimination privilege with a grant of use immunity.

Rosso's evidence would not have provided Jeffers with an effective alibi; at best, it would have helped corroborate his explanation for his alibi. It hardly rises to the level of the evidence in the Virgin Islands case, in which the witness inculpated himself. We find that Jeffers' contentions on this issue are without merit.

The appellant also claims error by the trial court in failing to give defendant's requested instruction that the defense unlike the prosecution was powerless to grant any witness immunity in order to assure their testimony.

Appellant has failed to cite any authority which would require the court to give such an instruction. The jury was aware during trial and from closing arguments that the prosecution alone presented the testimony of immunized witnesses. The defense stated in closing argument that they had been unable to present the testimony of the alleged alibi witness who Jeffers stated he saw at Danny's Bar at the time of the murder:

> No one in the world wishes more than I, except maybe Mr. Jeffers, that we could have had that person in here that sold him that heroin in Danny's on October 21st. I would have given anything. I would have stopped practicing law to have that man in here and I like to practice law, but we didn't and we couldn't, but we tried.
>
> How likely do you think it is that someone out at Danny's, in the business of selling heroin, is going to talk to the defense and come in here in front of a jury and tell you, "I did it." And subject himself to criminal prosecution. Unlikely and improbable. TR 19-125.

The defense repeatedly attacked the immunized witnesses, arguing that they fabricated their testimony to escape criminal prosecution. We find that the defense was allowed to make its point repeatedly and that this argument, the questions asked at trial, and the standard credibility instruction combined to give Jeffers a fair

opportunity to present his theory of the case. We find no error in the failure of the trial court to give appellant's instruction on immunity.

INSTRUCTION DEFINING POISON

Appellant contends that the trial court erred in instructing the jury that "Murder by means of poison is ... first-degree murder" and that "The word 'poison' means any substance introduced into the body by any means which by its chemical action is capable of causing death." (Jury Instructions Nos. 9, 11). He argues that heroin is not a "poison" under the definition in United American Life Ins. Co. v. Beadel, 13 Ariz. App. 196, 199, 475 P.2d 288, 291 (1970), namely, "any substance having an inherent deleterious property which renders it, when taken into the system, as capable of destroying life." [emphasis in original]. Thus, he concludes, the instructions were not justified by the evidence presented and hence were prejudicial error. State v. Williams, 120 Ariz. 600, 587 P.2d 1177 (1978); State v. Heath, 122 Ariz. 36, 592 P.2d 1302 (1979).

We find no merit in this argument. The Beadel case, supra, dealt with civil matters involving insurance coverage and is not controlling on this issue. In Beadel the court recognized the conflict in authority as to whether the term "poison" is limited to substances which are "inherently" toxic, or whether it includes all ingested substances which are "toxic in fact." In this civil case, the court of appeals, acting from common principles of contractual construction and insurance law, resolved this ambiguity by explicitly invoking "the rule to construe undefined terms against the insurer" that drafted the policy. Id. at 200, 475 P.2d at 292. In this criminal case, we are not constrained by such presumptive rules of construction, and are free to make a more neutral examination of this issue. We find the jury instruction given in the court below reflects the better definition of poison in criminal cases. More specifically, there is substantial authority that heroin is considered a poison in the criminal context. Tidd v. Skinner,

225 N.Y. 422, 122 N.E. 247, 3 A.L.R. 1145 (1919); Napier v. State, 357 So.2d 1001 (Ala. App. 1977), rev'd on other grounds, 357 So.2d 1011 (Ala. 1978); People v. Brown, 37 Mich. App. 192, 194 N.W.2d 560 (1971); People v. Cruciani, 70 Misc.2d 528, 334 N.Y.S.2d 515 (1972). The evidence was in conflict whether the victim died of a heroin overdose or by strangulation. The defense theory was that Penny died of an overdose either self-administered or administered by persons other than the defendant. The prosecution's theory was that Jeffers administered the heroin. Thus the evidence presented justified the instructions and there was no error.

NEWLY DISCOVERED EVIDENCE

Following his conviction, Jeffers came into contact with Stanford A. Lewis, a fellow inmate at the Pima County Jail. Lewis agreed to testify that he saw Jeffers in Danny's Bar sometime in October, 1976. Jeffers filed a motion to vacate judgment on the basis of this newly discovered evidence. At the evidentiary hearing Lewis was unable to narrow down the date on which he had seen Jeffers beyond that it was during the last two weeks of October. Other testimony indicated that Lewis had first told investigators that it was definitely before October 17 and as early as October 10, 1976, when he saw Jeffers in the bar. Jeffers claims Lewis might have been him in Danny's Bar on the day of the murder, October 21, 1976. The trial court denied the motion to vacate. Jeffers claims this was error.

Jeffers also filed a petition for post-conviction relief on the ground of newly discovered evidence. That evidence included a statement by Charles Van Der Veer, Doris' husband, that he had heard Doris say she choked Penny Cheney and injected her with heroin. Charles was also present with Doris and Sharon Galarza at a meeting that had not been mentioned at trial. The "new" evidence also included a statement that Ramona Epling was aware of information that she did not testify about and that part of her testimony was false. The court denied the petition without granting an evidentiary hearing on the matter. Jeffers claims

this was error and that dismissing the petition without hearing denied him the right to a hearing on his claim.

In order for relief to be granted because of newly discovered evidence, the material introduced would have to satisfy five requirements: (1) it must truly be newly discovered, i.e., discovered after the trial; (2) the record must contain facts from which the court can infer due diligence; (3) the evidence must not be merely cumulative or impeaching; (4) it must be material to the issues involved; and (5) it must be evidence that would probably change the verdict if a new trial was ordered. State v. Austin, 124 Ariz. 231, 603 P.2d 502 (1979), cert. denied, 446 U.S. 911, 100 S.Ct. 1841, 64 L.Ed.2d 264 (1980); State v. Urry, 104 Ariz. 244, 450 P.2d 1018 (1969); Rules 24.2a(2), 32.1, Arizona Rules of Criminal Procedure, 17 A.R.S. A trial court in granting or denying a motion for new trial is accorded broad discretion. The trial court's ruling will not be reversed unless an abuse of discretion affirmatively appears. State v. Salinas, 129 Ariz. 364, 631 P.2d 519 (1981); State v. Jones, 125 Ariz. 417, 610 P.2d 51 (1980). Further, the witness who is expected to testify must appear to the trial court to be credible. Lewis' credibility is for the judge hearing the motion to determine. State v. Salinas, supra.

The trial court found that the testimony of Stanford Lewis did not warrant a new trial. More is required to warrant a new trial than mere conjecture or a possibility that the proffered testimony would affect the verdict. State v. Austin, supra. We do not believe that Lewis' inconclusive testimony satisfied the requirement that the new evidence would probably have changed the verdict. Furthermore, the motion was properly denied if Lewis' testimony was not credible to the trial court. State v. Hughes, 13 Ariz. App. 391, 477 P.2d 265 (1970). We find no abuse of discretion in the denial of Jeffers' motion for new trial based on the testimony of Stanford Lewis.

The trial court also did not err in denying Jeffers' petition for post-conviction relief. It has long been settled that where a

defendant knows of the existence and identity of a witness before trial and makes no effort to obtain the witness' testimony, such testimony will not ordinarily justify a new trial. State v. Salinas, supra; State v. Yanich, 110 Ariz. 172, 516 P.2d 308 (1973). The existence and identity of Charles Van Der Veer and his relationship to Doris were well known by the defense in this case long before trial. The statement of Charles concerned statements made by Doris which had been covered at trial. There is also considerable doubt of Charles' reliability as a witness when he waited such a long time to make his statement. The record supports the ruling of the trial judge.

Ramona Epling was a witness at trial and was subjected to vigorous cross-examination. The jury was presented with matters which may have caused them to question her testimony. Evidence concerning information she possessed, but about which she was never asked, is hardly newly discovered. See State v. Ford, 108 Ariz. 404, 499 P.2d 699 (1972), cert. denied, 409 U.S. 1128, 93 S.Ct. 950, 35 L.Ed.2d 261 (1973).

Jeffers argues that he was denied the right to subpoena witnesses because the trial court refused to grant an evidentiary hearing. In order to be entitled to a hearing the proponent must present the court with a colorable claim. To be a colorable claim, the offering must appear to be valid; that is, "if the defendant's allegations are taken as true, would they change the verdict?" State v. Richmond, 114 Ariz. 186, 194, 560 P.2d 41, 49 (1976).

Here, the trial court found that even if Jeffers' "new" evidence was taken as true, a new trial would not be justified. We agree with the trial court that the evidence is merely impeaching and that it was far from probable that the evidence would cause a different result. We further hold that it was not newly discovered.

RESENTENCING BY TRIAL JUDGE

On April 14, 1978, the Honorable Ben C. Birdsall sentenced appellant to death for the crime of first degree murder. While

the appeal of the conviction and sentence were pending before this Court, the entire matter was remanded for sentencing in accordance with State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

Appellant was again sentenced to death. He raises several additional issues on appeal of his resentencing.

Appellant contends that the resentencing by Judge Birdsall, the trial judge, denied him his constitutional right to a fair and impartial tribunal. Prior to the resentencing, a hearing was conducted by Judge Robert O. Roylston to determine whether the trial judge should conduct the resentencing. Evidence adduced at the hearing showed the trial judge had been the target of a scheme involving the receipt of unsolicited goods from several mail order firms. The judge reported these activities to the postal authorities in order to get the mailings stopped. Appellant admitted sending these mailings to the judge, however, he was never charged with any crime in connection with these mailings. Additional evidence indicated that Judge Birdsall was annoyed at the matter and wanted it stopped, but that he treated it "pretty much as a joke." Judge Roylston found there were not sufficient grounds for finding bias or prejudice; appellant's motion for change of judge was denied.

We do not find a violation of appellant's right to a fair and impartial tribunal at every stage of the proceeding. He received a fair hearing on the matter. The burden of proof was on appellant as he was the party alleging the bias or prejudice. State ex rel. Riley v. Collins. 7 Ariz. App. 36, 435 P.2d 871 (1968). He failed to meet this burden.

Additionally, we agree with the court of appeals when they stated:

> [W]here a party acts deliberately and with an ulterior motive in such a way as to cause the judge to become biased and prejudiced against that party, he is not entitled to have the judge disqualified. Ponder v. Davis, 233 N.C. 699,

65 S.E.2d 356 (1951); In Re Union Leader Corporation, 292 F.2d 381 (1st Cir.), cert den'd. 368 U.S. 927, 82 S.Ct. 361, 7 L.Ed.2d 190 (1961).

Smith v. Smith, 115 Ariz. 299, 303, 564 P.2d 1266, 1270 (App. 1977).

This kind of conduct should not be rewarded. Furthermore, appellant has not shown how this alleged bias or prejudice operated to his detriment. This court will search the record and make an independent determination whether the death penalty should be imposed. State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977). This we have done and have found no error in the sentence imposed by the trial judge. Appellant has not received a harsher sentence than that received in the original sentencing.

AGGRAVATING CIRCUMSTANCES

The state bears the burden of proving the existence of aggravating circumstances beyond a reasonable doubt. A.R.S. § 13-703(C); State v. Jordan, 126 Ariz. 283, 614 P.2d 825 (1980). In death penalty cases this court independently reviews the facts that the trial court found established the presence or absence of aggravating and mitigating circumstances, and we determine for ourselves if the latter outweigh the former when we find both to be present. State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977); State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976).

The trial court found that the evidence established two of the statutory aggravating circumstances: A.R.S. § 13-703(F) (3) and (6).

A.R.S. § 13-703(F)(3) provides that the sentencing court must consider it an aggravating circumstance if "[i]n the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense." Appellant contends that this subsection refers to indiscriminate attacks in which the murderous act itself puts others in a danger zone, such as bombing an inhabited building

or firing a gun into a crowd. He points out that in all Arizona cases to date which have affirmed the existence of this aggravating circumstance, the murderous attack has itself injured another person or persons in addition to the victim of the offense. See State v. Doss, 116 Ariz. 156, 568 P.2d 1054 (1977) (gunshots in crowded college gymnasium killed victim and wounded a bystander); State v. Blazak, 114 Ariz. 199, 560 P.2d 54 (1977) (gunshots in crowded bar killed two victims and wounded another); cf. State v. Clark, 126 Ariz. 428, 616 P.2d 888 (1980) (this aggravating circumstance not found in quadruple murder case because evidence indicated that allegedly endangered victim was in another room, thus outside the "zone of danger" created by murder's gunshots).

The person found to be the object of the grave risk of death was Doris Van Der Veer. Doris testified that appellant pointed a gun at her when she returned to the motel room and found Penny Cheney lying on the bed unconscious. Based upon this evidence, the jury found appellant guilty of assault with a deadly weapon. The trial judge also used this evidence to support the finding that appellant created a grave risk of death to Doris, stating, "The Court has no reasonable doubt that the defendant would have killed Doris Van Der Veer with that gun if she had not complied with his orders."

Despite the finding of the trial judge we do not believe that the evidence brings this situation within the orbit of what was intended by A.R.S. § 13-703(F)(3). The pointing of a gun at Doris was sufficient to support a conviction for assault with a deadly weapon, but the act is not sufficient to satisfy the requirements of this particular aggravating circumstance.

The peculiar facts of this case show, according to Doris' testimony, that the defendant put the gun down after the initial confrontation with her, and he proceeded with his program of killing the victim. Doris was required to remain quiet and submissive to Jeffers' direction, but it appears that he never actually intended to harm her. It would stretch the statute to extreme length to hold that this activity was within A.R.S. § 13-703(F)(3). We do not believe that the finding of the trial judge was correct on this issue.

A.R.S. § 13-703(F)(6) provides that it is an aggravating circumstanc if the defendant "committed the offense in an especially heinous, cruel, or depraved manner." This Court has applied this provision of our death penalty statute by looking to the dictionary definitions of the words used. State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), cert. denied, 435 U.S. 908, 98 S.Ct. 1458, 55 L.Ed.2d 500 (1978). The element of cruelty involves the pain and the mental and physical distress visited upon the victims. Heinous and depraved involve the mental state and attitude of the perpetrator as reflected in his words and actions. State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980). "Heinous" means "hatefully or shockingly evil; grossly bad "; "cruel" means "disposed to inflict pain esp. in a wanton, insensate or vindictive manner; sadistic"; and "depraved" means "marked by debasement, corruption, perversion or deterioration." State v. Madsen, 125 Ariz. 346, 609 P.2d 1046 (1980); State v. Knapp, supra.

The sentencing judge found that this aggravating circumstance existed, stating that "The defendant committed the offense of first degree murder in an especially heinous, cruel and depraved manner." We must independently determine whether the state proved any one of these elements beyond a reasonable doubt.

We find that the element of cruelty was not proven. There was no evidence that the victim suffered any pain. It appears from the record that after the injection of heroin the victim lost consciousness and never regained it before she died. Therefore, the victim experienced no pain or mental suffering and the murder was not "cruel" for purposes of A.R.S. § 13-703(F)(6).

The sentencing judge apparently based his finding that the murder was "especially heinous ... and depraved" on Doris' testimony that appellant strangled the victim while she was totally unable to resist, beat the dead victim about the face and reviled her, dragged the body to the shower stall where it remained for three days, and then wrapped the body in garbage bags and buried it in a shallow grave in a remote area, where wild animals unearthed and devoured the body. In other words, the judge's findings were largely based upon acts which occurred after the victim's death.

Appellant states that the heinous or depraved nature of the crime is determined by the killer's state of mind at or near the time of the offense. State v. Lujan, 124 Ariz. 365, 604 P.2d 629 (1979). From this he argues that events surrounding the disposition of the corpse, occurring as they did several days after the killing or even later, cannot be considered in determining whether the crime was heinous or depraved. See State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979). We are unwilling to lay down any per se rule concerning how near the time of the offense the aggravating acts must take place, because we can imagine hypothetical situations in which a murder's actions toward the victim's body long after the death could shed light on what the killer's state of mind was when the killing was done. But we are certain that courts may consider the murderer's acts after the victim's death in determining if this aggravating factor exists. See State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980); State v. Simants, 197 Neb. 549, 250 N.W.2d 881 (1977) (defendant killed six people and sexually attacked the three female victims after their deaths; court found depravity).

However, we find that we need not decide whether the appellant's disposing of the victim's body was too long after the commission of the murder to be considered as an aggravating circumstance, because we believe the events surrounding the murder itself support the trial court's finding that the murder was "especially heinous ... and depraved."

We recently delineated factors to consider in determining whether the offense was committed in a heinous or depraved manner. State v. Gretzler (No. 3750-2, filed Jan. 6, 1983). One factor we should consider is the infliction of gratuitous violence on the victim. In State v. Ceja, supra, the defendant robbed a woman and her husband and shot the couple to death. He continued shooting the victims when it was apparent that they had already been fatally wounded. He then repeatedly kicked the male victim in the face, although the victim was already unconscious or dead. We concluded that this additional gratuitous violence distinguished the murders from the "usual or the norm" of first degree murders and upheld the trial court's finding of heinous and depraved.

great violence

In the instant case the defendant climbed on top of the dead victim and hit her in the face several times which eventually resulted in additional wounds and bleeding.

Another factor discussed in Gretzler is the apparent relish with which the defendant commits the murder. In State v. Bishop, 127 Ariz. 531, 622 P.2d 478 (1980), we found the murder was committed in an especially heinous and depraved manner where the defendant killed the victim by striking him repeatedly with a hammer, then tied him up, caused him to fall down a mine shaft and threw rocks on top of him while he was still alive. As the defendant left the scene he turned to his victim and waived saying, "Goodbye, Norman, I hope we never see you again." 127 Ariz. at 534, 622 P.2d at 481. In the case at bar while Jeffers was beating the victim he called her "a bitch and a dirty snitch" and with each striking blow said, "This one is for so and so. [naming several names]." This evidences the relish with which appellant committed the murder. In light of these prior decisions and the Gretzler considerations, we find that the remarks made by appellant, while at the same time beating his victim, establish that the offense was committed in an especially heinous and depraved manner.

verbal

(2.)

In addition appellant urges that § 13-703(F)(6) as construed and applied by this court, is unconstitutional as overly broad. We have addressed the constitutionality of § (F)(6) on numerous occasions. Each element - cruel, heinous, and depraved - has been narrowly defined and construed. This issue was discussed at length in State v. Gretzler, supra, and found to meet constitutional standards.

Appellant, citing Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), contends our statute is overbroad because it is read in the disjunctive - cruel, heinous, or depraved. We disagree with appellant that our statute becomes unconstitutional merely because we choose to read it in the disjunctive, while Georgia does not. The thrust of appellant's argument is that the disjunctive reading of § (F)(6) would allow an arbitrary imposition of the death penalty since § (F)(6) could apply to any murder. A review of Arizona case law shows this is not true. We have been

insistent that the murder be especially cruel or especially depraved before this section would apply. We have clearly defined the terms and have delineated factors to guide us in determining if the crime was indeed committed in such a manner. State v. Gretzler, supra.

Further the case law reveals that § (F)(6) is not applicable to any and all murders, this court has narrowly limited its applicability to cases which stand apart from the norm. State v. Gretzler, supra, State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980).

MITIGATING FACTORS

Another contention appellant makes is that the trial court erred in not considering factors in mitigation as well as not finding that such mitigation was sufficiently substantial to call for leniency. The court, urges appellant, should have found as mitigation that he was under the influence of heroin at the time of the murder and that this drug intoxication markedly impaired appellant's mental state at the time.

There is no evidence to contradict the fact that appellant had ingested heroin on the day of the murder. While intoxication is not a defense, a jury may consider the effects of voluntary intoxication upon an accused's culpable mental state. A.R.S. § 13-503; State v. Laffoon, 125 Ariz. 484, 610 P.2d 1045 (1980). However, wholly voluntary acts of a defendant will not excuse his subsequent criminal conduct. State v. Cooper, 111 Ariz. 332, 529 P.2d 231 (1974). The record shows the trial court did consider appellant's drug intoxication along with testimony by psychiatrists for appellant and the state. Dr. Gurland, a defense psychiatrist, testified that heroin has the effect of calming people down. Other evidence showed that long-term heroin users like appellant develop a tolerance to the effects of the drug. Doris Van Der Veer testified that appellant had not used an excessive amount of heroin, by appellant's standards, on the day of the murder. The court found that while appellant was drinking and using narcotics the day of the murder there was no credible evidence of any significant impairment of his capacity to appreciate the wrongfulness of his conduct or to conform

NO IND. REVIEW

his conduct to the requirements of law. After reviewing the record we agree with the trial court's findings.

As further mitigation appellant contends his stormy love-hate relationship with the victim raised the classic provocation situation and the crime was induced by the heat of passion. There is nothing in the record which indicates there was an argument or that the crime was induced by heat of passion. Appellant did learn that the victim may have been an informant against him, but this knowledge was gained in late July or early August 1976, months before the October 21 murder. About a week before the killing appellant met with the victim and discussed the possibility that she had been an informant against him. There he also was advised that the victim was now a prostitute and would charge for her sexual favors. Appellant testified that he accepted the situation and that he was not mad.

Even were the victim's actions sufficient to constitute adequate provocation, there was a sufficient lapse of time between the provocation and the killing for the passions to "cool." See State v. Ramirez, 116 Ariz. 259, 569 P.2d 201 (1977). The record shows that the trial court did consider this evidence of possible provocation and found that appellant may have had reason to be provoked, that he was under some stress, and may have had motives for killing the victim, but "nothing more."

The third mitigating factor advanced by appellant is the information given to Dr. Gurland, the defense psychiatrist, while appellant was under the influence of sodium amytal, which according to the doctor, was consistent with appellant's innocence. While sodium amytal evidence is not admissible in Arizona courts, see State v. Thomas, 79 Ariz. 158, 285 P.2d 612 (1955), cert. denied, 350 U.S. 950, 76 S.Ct. 326, 100 L.Ed. 828 (1956), mitigation evidence presented under Arizona's death penalty statute need not meet the normal standards for admissibility.

Both Dr. Gurland and Dr. LaWall, the state psychiatrist, agreed that under certain circumstances a sodium amytal interview can be

reliable. Both doctors also agreed that it is not a "truth serum," that persons can lie and fabricate while under the influence of the drug.

The trial court had this medical testimony before it to determine appellant's credibility as well as evidence adduced at trial including appellant's own testimony along with appellant's prior conviction for forgery introduced for impeachment purposes. The record shows the trial court considered all the evidence presented at trial and at the post-trial hearings and found no mitigating factors sufficiently substantial to call for leniency.

We have carefully reviewed the record as required to determine whether the factors in mitigation outweigh the aggravating circumstances, State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), cert. denied, 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977), and we find they do not.

CONSTITUTIONAL ARGUMENTS

First, appellant asks that his death sentence be set aside because it is disproportionate to the sentence imposed in similar cases. This is not true. Our analysis in State v. Gretzler, supra, of the various death penalty cases which have come before this Court, reveals the similarities in the cases in which the death penalty was affirmed. As we discussed in the section on aggravating circumstances, infra, the instant case does have similarities to other cases where the death penalty was imposed.

Another constitutional attack raised by appellant is that the Arizona scheme for the imposition of the death penalty is unconstitutionally vague. We have addressed this issue many times before with a resolution adverse to appellant. State v. Gretzler, supra; State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied, 440 U.S. 924, 99 S.Ct. 1254, 59 L.Ed.2d 478 (1979).

The ninth circuit has resolved the issue in a similar manner. Knapp v. Cardwell, 667 F.2d 1253 (9th Cir. 1982), cert. denied (51 U.S.L.W. 3407, Nov. 30, 1982).

Additionally appellant contends that the reimposition of his death sentence pursuant to State v. Watson, supra, is an unconstitutional violation of the following: the due process clause, the ex post facto clause, the double jeopardy guarantees, the prohibition against judicially created penalties, and the guarantee of a republican form of government and a separation of powers. These issues have each been previously determined, again, with a resolution adverse to appellant. Knapp v. Cardwell, supra; State v. Gretzler, supra.

We have reviewed the entire record pursuant to A.R.S. § 13-4035 and found no fundamental error. In our independant determination we found one aggravating factor - that the offense was committed in an especially heinous and depraved manner - and no mitigating factors sufficiently substantial to call for leniency. Judgment of conviction and sentence are affirmed.

WILLIAM A. HOLOHAN, Chief Justice

CONCURRING:

FRANK X. GORDON, JR., Vice Chief Justice

JACK D. H. HAYS, Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

Appendix B

RECEIVED

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ANNA L. CATES
CHIEF DEPUTY CLERK

April 6, 1983

STATE OF ARIZONA,

Appellee,

vs.

JIMMIE WAYNE JEFFERS,

Appellant.

Supreme Court
No. 4253

Pima County
No. A-31934

The following action was taken by the Supreme Court of the State of Arizona on April 5, 1983 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing = DENIED."

Copy of Order Affirming Judgment enclosed.

S. ALAN COOK, Clerk

By Arlene Bledsoe
Deputy Clerk

TO:
James W. Stuehringer, Esq., Suite 611, Transamerica Building, Tucson, Arizona 85701
Mr. Frederic J. Dardis, Pima County Public Defender, 45 West Pennington, Tucson, Arizona 85701
Hon. Robert K. Corbin, Attorney General, 1275 West Washington Street, Phoenix, Arizona 85003
Mr. Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701 ATTN: D. Jesse Smith

Appendix C

AMENDMENT IV [1791]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix D

AMENDMENT VIII [1791]

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Appendix E

AMENDMENT XIV [1868]

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. EP

Appendix F

§ 13-703

F. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

7. The defendant committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail.

Appendix G

OCT 27 '79 Rec'd

MARYANN HOPKINS-YOUNG
CLERK

Supreme Court

STATE OF ARIZONA
201-WEST WING
CAPITOL BUILDING
Phoenix 85007

TELEPHONE
255-4536

October 24, 1979

STATE OF ARIZONA,

Appellee,

vs.

JIMMIE WAYNE JEFFERS,

Appellant.

Supreme Court
No. 4253

Pima County
No. A-31934

The following action was taken by the Supreme Court of the State of Arizona on October 23, 1979 in regard to the above-entitled cause:

"ORDERED: Motion to Stay Appeal pursuant to Rule 31.4, Rules of Criminal Procedure - GRANTED.

FURTHER ORDERED: The matter is remanded to the Superior Court of Pima County for resentencing pursuant to State v. Watson, 120 Ariz 44, 586 P.2d 1253 (1978)."

MARYANN HOPKINS-YOUNG, Clerk

By Kathleen E. Kempley
Deputy Clerk

TO:

Stephen D. Neely, Pima County Attorney, 111 West Congress, Tucson, Arizona 85701 Attn: D. Jesse Smith
Hon. Robert K. Corbin, Attorney General, 200 West Wing, State Capitol Building, Phoenix, Arizona 85007
Donald S. Klein, Esq., Klein & Klein, 100 North Stone Avenue, Suite 903, Tucson, Arizona 85701
Frank Leto, Esq., 2302 East Speedway, Suite 108A, Tucson, Arizona 85719
Hon. Ben C. Birdsall, Judge, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701
James N. Corbett, Clerk, Pima County Superior Court, Pima County Courthouse, Tucson, Arizona 85701 (Certified Copy)
Jimmie Wayne Jeffers, Arizona State Prison, Box B 38604, Florence, Arizona 85232

Appendix H

SCHOTLAND & STUEHRINGER
ATTORNEYS AT LAW
611 TRANSAMERICA BUILDING
TUCSON, ARIZONA 85701
(602) 622-4666

James W. Stuehringer

Attorneys for Appellant JEFFERS

IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE OF ARIZONA, Appellee, vs. JIMMIE WAYNE JEFFERS, Appellant.	Supreme Court No. 4253 (Pima Co. No. A-31934) MOTION FOR ADDITIONAL BRIEFS AND ORAL ARGUMENT

Appellant, JIMMIE WAYNE JEFFERS, by and through his undersigned counsel, respectfully moves this Honorable Court to order the parties to file additional Briefs and then grant oral argument on a new aspect of his capital sentence raised by virtue of this Court's opinion. The grounds for this motion are set forth in the attached Memorandum of Points and Authorities.

RESPECTFULLY SUBMITTED this 14th day of March, 1983.

SCHOTLAND & STUEHRINGER

BY: James W. Stuehringer
JAMES W. STUEHRINGER,
Attorneys for Appellant
by Mail

PIMA COUNTY PUBLIC DEFENDER

BY: Donald S. Klein
DONALD S. KLEIN, Assistant Public Defender
by Mail

BY: Frank P. Leto
FRANK P. LETO, Assistant Public Defender
by Mail

MEMORANDUM OF POINTS AND AUTHORITIES.

In the Motion for Rehearing filed by Appellant on this date, the defense has raised several issues regarding the propriety of a remand in his case for a new sentencing hearing. These defense arguments were triggered by this Court's affirmance of Appellant's death penalty notwithstanding its holding that the lower court's sentencing verdict was based upon misinterpretations of the statutory aggrevating circumstances. As discussed in the Motion for Rehearing, the majority of state courts require a remand for a new sentencing proceeding under such circumstances.

The defense believes that this is an issue of first impression in Arizona and thus merit full briefing treatment given the obvious stakes involved in the instant case. Furthermore, the United States Supreme Court has recently expressed concern with this precise issue as evidenced by its recent opinion in Zant v. Stephens, __U.S.__, 102 S.Ct. 1856 (1982). See also, Proffitt v. Wainwright, 685 F.2d 1227, 1261-1270 (11th Cir. 1982).

For all of these reasons, Appellant respectfully urges this Court to order the parties to fully brief this important issue regarding the Arizona death penalty statute and to thereafter

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SCHOTLAND & STUEHRINGER
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811 TRANSAMERICA BUILDING
TUCSON, ARIZONA 85701
(602) 622-4668

allow the parties to be heard in oral argument.

RESPECTFULLY SUBMITTED this 14th day of March, 1983.

SCHOTLAND & STUEHRINGER

BY: James W. Stuehringer by Mail
JAMES W. STUEHRINGER,
Attorneys for Appellant

PIMA COUNTY PUBLIC DEFENDER

BY: Donald S. Klein by Mail
DONALD S. KLEIN, Assistant Public Defender

BY: Frank P. Leto by Mail
FRANK P. LETO, Assistant Public Defender

A copy of the foregoing delivered this 14th day of March, 1983, to:

Pima County Attorneys Office
111 West Congress
Tucson, Arizona 85701

SCHOTLAND & STUEHRINGER
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Appendix I

S. ALAN COOK
CLERK

Supreme Court
STATE OF ARIZONA
201 WEST WING
CAPITOL BUILDING
(602) 255-4536
Phoenix 85007

ANNA L. CATES
CHIEF DEPUTY CLERK

March 30, 1983

STATE OF ARIZONA,

Appellee,

vs.

JIMMIE WAYNE JEFFERS,

Appellant.

Supreme Court
No. 4253

Pima County
No. A-31934

The following action was taken by the Supreme Court of the State of Arizona on March 29, 1983 in regard to the above-entitled cause:

"ORDERED: Motion for Rehearing - Continued for one (1) week.

FURTHER ORDERED: Motion for Additional Briefs and Oral Argument - DENIED."

S. ALAN COOK, Clerk

By Arlene Bledsoe
Deputy Clerk

TO:

James W. Stuehringer, Esq., Schotland & Stuehringer, Suite 611, Transamerica Building, Tucson, Arizona 85701
Donald S. Klein, Esq., Pima County Public Defender's Office, 45 West Pennington Street, Third Floor, Tucson, Arizona 85701
Hon. Robert K. Corbin, Attorney General, 1275 West Washington Street, Phoenix, Arizona 85007
D. Jesse Smith, Esq., Pima County Attorney's Office, 111 West Congress, Tucson, Arizona 85701

Appendix J

PUBLIC DEFENDER
APR 26 1983
APPEALS RECEIVED

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILED
APR 19 1983
CLERK SUPREME COURT
BY

STATE OF ARIZONA,

Appellee,

v.

JESS JAMES GILLIES,

Appellant.

No. 5424

Appeal from the Superior Court of Maricopa County

The Honorable Stephen H. Scott, Judge

(Cause No. CR-117615)

SUPPLEMENTAL OPINION

Remanded for Resentencing;
Motion for Rehearing Denied.

Robert K. Corbin
The Attorney General
By William J. Schafer III
and David R. Cole
Assistant Attorneys General — Phoenix
Attorneys for Appellee

Ross P. Lee
Maricopa County Public Defender
By H. Allen Gerhardt
Deputy Public Defender — Phoenix
Attorneys for Appellant

and

Jess James Gillies (Pro Per)

HAYS, Justice

This matter is before us on a motion for rehearing. After re-examination of the evidence and the law, we have concluded that it would be more appropriate for us to remand the first degree murder count to the trial court judge for resentencing.

In our opinion we struck down three of the four aggravating circumstances found by the trial court. The trial court had indicated that there were mitigating circumstances but they were not sufficiently substantial to call for leniency. Law and policy would indicate that the trial judge should again make the determination required by A.R.S. § 13-703(E). See also Zant v. Stephens, ____ U.S. ____, 102 S. Ct. 1855 (1982).

We remand for resentencing. Motion for rehearing is denied.

JACK D. H. HAYS, Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

Appendix K

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

FILED
MAR 1 1983
CLERK SUPREME COURT
BY

STATE OF ARIZONA,
Appellee,
v.
JESS JAMES GILLIES,
Appellant.

No. 5424

Appeal from the Superior Court of Maricopa County
The Honorable Stephen H. Scott, Judge
(Cause No. CR-117615)
AFFIRMED IN PART, REMANDED IN PART

Robert K. Corbin
The Attorney General
By William J. Schafer III
and David R. Cole
Assistant Attorneys General — Phoenix
Attorneys for Appellee

Ross P. Lee
Maricopa County Public Defender
By H. Allen Gerhardt
Deputy Public Defender — Phoenix
Attorneys for Appellant

and

Jess James Gillies (Pro Per)

HAYS, Justice

In the early morning of January 29, 1981, Suzanne Rossetti was reported missing by her parents when she failed to pick them up

to drive them to the airport. Her body was discovered several days later buried under a pile of rocks on Fish Creek Hill in the Superstition Mountains. The medical examiner determined that the cause of her death was exsanguination, aspiration of blood and extensive head injuries.

Appellant Jess Gillies was arrested on February 3, 1981, tried and convicted by a jury of kidnapping, sexual assault, aggravated robbery, computer fraud in the first degree, and first degree murder. He was sentenced to 21 years each for the kidnapping and sexual assault, to 15 years each for the aggravated robbery and the computer fraud, all sentences to run consecutively, and to death for the first degree murder conviction. We have jurisdiction of the appeal from the convictions and sentences pursuant to A.R.S. § 13-403 § 13-4035 and Ariz. Const. art. 6 § 5 (3).

Confessions by the appellant to various friends led to his arrest and constituted the majority of evidence against him. Gillies lived and worked at Weldon's Riding Stables in Phoenix at the time of the crime. On January 28, 1981, Gillies and Mike Logan[1] were in the U-Totem at 52nd Street and Van Buren when Suzanne Rossetti drove up to make a purchase. Upon returning to her car, she discovered she had locked herself out and solicited the aid of the two young men. In gratitude for their help in unlocking her car, Rossetti bought the men a six-pack of beer and offered them a ride back to the riding stable. En route, one of the men grabbed Rossetti and, after

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1 Michael Logan was tried separately and sentenced to life imprisonment without possibility of parole for 25 years. Pursuant to a plea agreement, Logan showed the investigators where the body was buried and received this reduced sentence.

stopping the car, pulled her to the ground where they both raped her. Gillies and Logan drove their victim to Papago Park and then to her apartment, apparently raping her at both locations. The men rifled her purse and scavenged her apartment for valuables. (When arrested, Gillies was found in possession of several belongings of Rossetti, including her credit cards.) Rossetti was finally transported to the Superstitions where she was pushed from a cliff, tumbling 40 feet down the rocky hillside. Gillies and Logan pursued their victim down the hill and found her still alive. Rossetti begged for mercy, told the men she was going to die anyway and to let her die in peace. According to Gillies, Logan responded: "That' right, bitch, you are." According to Logan, Gillies began calling the victim a whore and a bitch. The victim was then bashed on the head with rocks until she lost consciousness. Gillies and Logan covered her with rocks (a detective testified that two men were neede to remove one of the rocks from her body) and drove back to Phoenix in her car. According to the medical examiner, Suzanne Rossetti died in approximately ten to fifteen minutes, presumably after she was buried.

Hair and blood were found near the victim's grave. Damage caused by small animals had been sustained by the body. The right cheek of the victim had been crushed and the eye was missing from the right socket. The medical examiner described various lacerations abrasions, avulsions, and fractures to the skull and body of the victim. The victim tested positive for seminal fluid.

Between January 28 and February 3, Gillies and Logan accessed the Valley National Bank 24-hour automated teller twenty-eight times using Rossetti's card. Because only $250 can be withdrawn in a given

if the prosecution must rely exclusively thereon for a conviction is not fundamental error. State v. Harvill, 106 Ariz. 386, 476 P.2d 841 (1970). Furthermore, appellant's conviction did not rest solely on circumstantial evidence. We find no merit to this second argument.

Failure to object to evidence, testimony or arguments waives these matters on appeal absent a finding of fundamental error. State v. Thomas, 130 Ariz. 432, 636 P.2d 1214 (1981). The last two issues were not objected to at trial and do not constitute fundamental error.

VII. AGGRAVATING AND MITIGATING CIRCUMSTANCES

At the sentencing, the court found four aggravating circumstances, concluded that the mitigating circumstances were not sufficiently substantial to call for leniency and sentenced appellant to death. Pursuant to State v. Richmond, 114 Ariz. 186, 560 P.2d 41, cert. denied 433 U.S. 915, 97 S. Ct. 2988, 53 L. Ed. 2d 1011 (1976), we must independently review the record to determine the absence or existence of both aggravating and mitigating circumstances and to determine, based on the record before us, whether the death penalty should be imposed.

The first aggravating circumstance found by the court was that appellant previously had been convicted of a felony involving the use or threat of violence on another person. A.R.S. § 13-703(F)(2). The state established this aggravating circumstance by bringing in a former victim of a theft committed by the appellant. The trial court permitted the victim to testify as to the particular factual circumstances of the theft, a class-six felony. The victim stated that appellant stole $23 and a radio from him, and that the appellant choked him with one hand around the neck and threatened to kill him and his parents. Based on this evidence, the trial court found that

the appellant's conviction of theft was an aggravating circumstance under § 13-703(F)(2) because the theft involved the use and threat of violence on another person. We hold that this is an incorrect application of A.R.S. § 13-703(F)(2).

In order to constitute an aggravating circumstance under A.R.S § 13-703(F)(2), the prior conviction must be for a felony which by its statutory definition involves violence or the threat of violence on another person. For example, in State v. Watson, supra, 120 Ariz. at 448, 586 P.2d at 1260 (1978), appellant argued that there was no showing of force or fear in his prior robbery conviction and therefore it could not constitute an aggravating circumstance. The court found this argument specious. "Fear of force is an element of robber and the conviction of robbery presumes that such fear was present."

This reading of the statute guarantees due process to a crimin defendant. Evidence of a prior conviction is reliable, the defendant having had his trial and exercised his full panoply of rights which accompany his conviction. However, to drag in a victim of appellant' prior crime to establish the necessary element of violence outside the presence of a jury, long after a crime has been committed, violat the basic tenets of due process.

The state has urged that State v. Greenawalt, 128 Ariz. 150, 624 P.2d 828 (1981), supports the trial court's finding of theft as an aggravating circumstance under § 13-703(F)(2). Greenawalt allows consideration of evidence of the circumstances surrounding defendant' prior criminal conduct for the purpose of determining the weight to be given a prior conviction. We cannot allow what is, in effect, a second trial on defendant's prior conviction to establish the existen of an A.R.S. § 13-703(F)(2) aggravating circumstance.

The next aggravating circumstance found by the trial court was that the offense was committed in expectation of the receipt of something of pecuniary value. A.R.S. § 13-703(F)(5). The state argues in support that because the appellant's theft of the victim's purse, money and credit cards occurred within one general transaction the totality of circumstances demonstrate an expectation of pecuniary gain.

In State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067, 101 S. Ct. 796, 66 L. Ed. 2d 612 (1980), we held that the application of this aggravating circumstance was not limited to the "hired gun" situation. However, we affirmed our prior holdings that the receipt of money must be established as a cause of the murde not a result. We concluded in Clark that the circumstances surroundi the episode reflected that the expectation of financial gain was a cause of the murders. In State v. Tison, 129 Ariz. 526, 592, 633 P.2d 335, 351 (1981), appellant's statements appearing in a psycholog evaluation offered in evidence at the mitigation hearing established that the whole purpose of the murders was to obtain an automobile.

Without some tangible evidence, or strong circumstantial inference, it is not for the sentencing court to conclude that because money and items were taken, the purpose of the murder was pecuniary gain. From an independent examination of the record, we do not find any evidence that the receipt of pecuniary gain was a cause of the murder. To the contrary, appellant's own confessions demonstrate that the purpose of the murder was to eliminate the victim as a witn to her own rape. Nor do we believe that the circumstances surroundi the episode reflect that the expectation of pecuniary gain was a caus of the murder.

The trial court additionally found that the defendant committe the offense while in the custody of the Department of Corrections. A.R.S. § 13-703(F)(7). We find that this aggravating circumstance did not exist.

On December 26, 1980, the appellant was granted work furlough status in connection with his prior theft conviction, permitting him to choose his place of residence and employment subject to approval by a supervising officer. Appellant moved to Weldon's Riding Stables where he both lived and worked at the time of the crime.

Arizona Revised Statutes § 31-234(C) states that a person in a work furlough program is in the "constructive custody" of the Department of Corrections. To fall within the terms of A.R.S. § 13-703(F)(7), defendant must have "committed the offense while in the custody of the department of corrections, a law enforcement agency or county or city jail." The legislative intent of this sectio is to protect the guards and other inmates at such institutions where a defendant is confined and to discourage violence by incarcerated persons. We hold that A.R.S. § 13-703(F)(7) does not apply to one who is on unsecured work furlough status.

The trial judge next found that the offense was committed in an especially heinous, cruel and depraved manner, stating:

> "The evidence that I have had presented to me establishes clearly that this victim was bound and terrorized for approximately eight hours prior to her death. The evidence establishes that she was raped by you as well as your accomplice on at least two different occasions, once at Papago Park area and the second time back at her apartment. The evidence establishes that you and the co-defendant either threw or pushed the victim down a 40-foot embankment, causing serious injuries to her at that time. The evidence has established that when you went down to the victim, she was injured, she was bleeding, she begged for mercy. The evidence establishes clearly that you

> showed a gross indifference to her situation. The victim was struck several times in the head by a rock. While she was still alive, you and your accomplice buried her under a pile of rocks. It was only thereafter she died."

The court found it was committed in a cruel manner because it was apparent that the victim suffered terrible pain and mental anguish prior to her death. We must agree.

Cruelty involves the mental and physical distress suffered by a victim. State v. Ceja, 126 Ariz. 35, 612 P.2d 491 (1980). Where the evidence is inconclusive as to whether a victim was conscious during the infliction of violence to his person, the sentencin court cannot find that cruelty existed. State v. Woratzeck, No. 5142 (filed December 17, 1982). Evidence of the mental anguish of a victi resulting from such factors as being held captive for an extended period, uncertain as to his ultimate fate, is also relevant to establish cruelty. State v. Steelman, 126 Ariz. 19, 612 P.2d 475 (1980)

Suzanne Rossetti was repeatedly raped, was transported from Phoenix to the Superstitions not knowing her fate, cast from a 40-foo cliff, then brutalized and beaten into unconsciousness prior to her death. The victim clearly suffered both physical pain and mental anguish. We find an abundance of evidence of cruelty and that the statutory aggravating circumstance of "especially cruel, heinous or depraved" is present. Because the finding of cruelty is so compellin it is unnecessary to make specific findings of heinousness and depravi See State v. Gretzler, supra.

As mitigating circumstances, the trial judge listed appellant's age (twenty years at the time of the offense); that a felony-murder instruction was given; and that the accomplice to the crime, Mike Logan, received life imprisonment.

While the age of the defendant might be a mitigating circumsta it will not alone always require leniency. State v. Valencia, 132 Ariz. 248, 250, 645 P.2d 239, 241 (1982), (age 16 is sufficiently substantial to call for life imprisonment instead of death). Jess Gillies was twenty at the time of the crime. The trial judge found that the deliberation, duration of the crime and maturity of appellan nullified his age. We agree.

The giving of a felony-murder instruction is a mitigating circumstance only where there is some doubt as to defendant's specifi intent to kill the victim. State v. Schad, 129 Ariz. 557, 574, 633 P.2d 366, 383 (1981), cert. denied, ____ U.S. ____, 102 S. Ct. 1492, 71 L. Ed. 2d 693 (1982). Arizona case law holds that the fact that a felony-murder instruction was given to the jury is not relevant "where the defendant intended to kill the victim or where the defendant knew with substantial certainty that his conduct would cause death." State v. Zaragoza, No. 5432 (filed January 10, 1983). In Zaragoza, the defendant, the sole perpetrator of the crime, hit the victim repeatedly on the head and left her bleeding in an alley. There was no question that Zaragoza killed the victim. The court concluded that it was reasonable to find that the defendant intended to kill the victim and held that the giving of the felony-murder instruction was therefore not a mitigating circumstance.

The facts of the case at bench merit further discussion of th felony-murder rule as a mitigating circumstance. Two men perpetrate crimes upon the victim, each has accused the other of being the murderer and there is some doubt as to who actually struck the fatal blow. Gillies' jury was instructed on both premeditation and felony murder and returned a verdict of guilty of first degree murder.

During deliberation, the jury sent a note to the judge asking if it was necessary to designate which type of first degree murder. The judge responded in the negative and told them to simply return one of the two forms of verdict (guilty or not guilty). Thus, while it is possible Gillies was found guilty of premeditated murder, it is also possible that the jury found him accountable for the murder only on a felony-murder theory.

The United States Supreme Court has very recently rejected the death penalty for accomplice liability in felony-murders. In Enmund v. Florida, __ U.S. __, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982), the Court held that a statutory scheme which permits the imposition of the death penalty, absent a finding that a defendant either killed, attempted to kill or intended to kill the victim, is unconstitutional. Enmund's codefendant robbed and fatally shot the victims at their farmhouse in central Florida; Enmund drove the getaway car. Both men were found guilty of first degree murder and sentenced to death. Enmund was an aider and abetter only to the underlying felony, was not present at the scene of the crime and did not intend a killing or anticipate the use of lethal force. The reco as construed by the Florida Supreme Court did not warrant a finding that Enmund had any intention of participating in or facilitating a murder. 102 S. Ct. at 3377, 73 L. Ed. 2d at 1152. The court surveye the felony-murder statutes nationally and concluded that society considers death a disproportionate penalty for those who fall within thi category. "American criminal law has long considered a defendant's intention--and therefore his moral guilt--to be critical to 'the degr of [his] criminal culpability.'" 102 S. Ct. at 3378, 73 L.Ed.2d at 1

While the Arizona capital sentencing statute reduces the

likelihood that the death penalty will be imposed on a vicarious felony-murderer, even when aggravating circumstances are present, by making a defendant's minimal participation in a homicide a mitigating circumstance,[3] Enmund appears to limit it further. We now consider the case in light of Enmund.

In Hall v. Florida, 420 So.2d 872 (1982), and Ruffin v. Florida, 420 So.2d 591 (1982), the Florida Supreme Court applied Enmund to facts very similar to the case at bar. Hall and Ruffin abducted their victim, a woman seven months pregnant, from a grocery store parking lot and drove her to a secluded wooded area where they sexually abused her. The victim was pistol-whipped on her head, neck and body, robbed of her purse and shot to death in the back of her head while lying face down on the ground. Both men challenged the imposition of the death penalty on the basis of Enmund. Ruffin argued that his uncontradicted statements proved he did not actively participate in the homicide (he claimed that Hall fired the fatal shot), and was at best a passive participant. The Florida court rejected this argument and distinguished Enmund on the grounds that Enmund was not present at the scene of the homicide, aided and abette only in the underlying felony, and did not intend or anticipate a killing:

> "In contrast, Ruffin was present, he assisted co-defendant Hall in the killing of Karol Hurst, raped her along with his partner, knew that Hall was going to kill her and made no effort to interfere with the killing and then continued on the joint venture,

---

[3] A.R.S. § 13-703(G)(3) provides as a mitigating circumstance: "The defendant was legally accountable for the conduct of another under the provisions of § 13-303, but his participation was relatively minor, although not so minor as to constitute a defense to prosecutio

> utilizing Mrs. Hurst's vehicle to drive to the convenience store . . .
>
> "The evidence is abundantly clear and sufficient to demonstrate Ruffin's joint participation in the premeditated murder of Karol Hurst, and this is the distinction between this case and the Enmund's case and that case is therefore not applicable to this proceeding."

Ruffin v. Florida, supra, 420 So.2d at 594.

A similar argument was rejected in Johnson v. Zant, 295 S.E.2d 63, 67 (1982), wherein the court said: "[W]e do not read Enmund so narrowly as to exclude imposition of the death penalty for all but those who fatally wield the murder weapon."

The trial judge specifically considered Gillies' participation in the crime, pursuant to A.R.S. § 13-703(G)(3), and concluded that the defendant was actively engaged in the kidnapping, the rape and the robbery of the victim, and that he transported her to the place where she was killed. The judge found it was immaterial who actually struck the blow to the head of the victim and that the evidence sufficiently showed that Gillies participated in the murder, if it was only to provide the rock which his accomplice used to strike her skull, causing death. "Her death is the result that you wished to have occurred, that is manifestly clear by your statements and manner, actions at the time the lady was killed. I do not find that your participation was relatively minor."

While Enmund apparently changes the current test in Arizona for imposing the death penalty upon the felony-murderer, i.e., the court must now find that the defendant either killed, attempted to kill or intended to kill the victim, we are satisfied that this requirement has been met. Gillies actively participated in the event

leading to the death of Suzanne Rossetti, was present at all times during the murder, and did nothing to interfere. He handed his accomplice the rock which was used to strike her and he helped bury the unconscious victim with rocks. According to the medical examiner the victim took ten to fifteen minutes to die by exsanguination, aspiration of blood and head injuries. If the evidence shows that th defendant took an active and deliberate part in the killing, the death penalty may be imposed even though the theory of felony-murder has been presented to the jury. State v. Steelman, supra, 126 Ariz. at 21, 612 P.2d at 477. We find there is sufficient evidence to show Gillies' participation in the murder was substantial and intentional.

This court has recognized as a mitigating circumstance the fact that an accomplice to the crime was sentenced to life imprisonme State v. Watson, 129 Ariz. 60, 628 P.2d 943 (1981). Appellant's accomplice, Mike Logan, received life imprisonment in exchange for pleading guilty to the first degree murder charge and leading the investigators to the victim's body. Appellant was also approached concerning a similar plea bargain with the state but chose instead to exercise his right to a trial. Given these facts, we do not consider the accomplice's sentence to be a mitigating circumstance. Any resulting inequity between the two sentences is a consequence induced by our plea-bargaining system.

Defense counsel also argued that appellant's capacity was impaired due to alcohol or mental disorder. Voluntary intoxication is a mitigating circumstance if defendant's capacity to appreciate the wrongfulness of his conduct was significantly impaired, but not so impaired as to constitute a defense to prosecution, State v. Jord 126 Ariz. 283, 614 P.2d 825 (1980). The only evidence that appellant

had been drinking on the night of the crime was testimony by a clerk at the U-Totem that the victim bought the two men a six-pack of beer and that they had been drinking before Rossetti arrived. It was never argued at trial that appellant was intoxicated nor did appellant present any credible evidence of intoxication or mental disorder at the sentencing hearing. The appellant apparently controlled the victim for a period of eight hours. Absent evidence, we cannot find this mitigating circumstance existed.

"[T]he death penalty should be reserved for only the most aggravating of circumstances, that are so shocking or repugnant that the murder stands out above the norm of first degree murders, or the background of the defendant sets him apart from the normal murderer." State v. Watson, supra, 129 Ariz. at 63, 628 P.2d at 946. We find that this murder is one which does indeed shock the conscience. In our independent review of the evidence, we find the existence of one aggravating circumstance, that the offense was committed in an especially cruel, heinous or depraved manner, and find that there are no sufficiently substantial mitigating circumstances to call for leniency. The death penalty is appropriate in this case.

VIII. PROPORTIONALITY REVIEW

It is also necessary to examine the eighth-amendment concept of proportionality as enunciated in recent cases to determine whether the death penalty imposed upon Jess Gillies is excessive or disproportionate to the penalty imposed in similar cases. State v. Gretzler, supra.

Courts have found it appropriate in several instances to sentence a defendant to life imprisonment rather than death where the defendant did not actually wield the murder weapon. In State v.

Encinas, 132 Ariz. 493, 647 P.2d 624 (1982), the victim was beaten, robbed and held down on the road by the defendant and his accomplice while a third, Gerlaugh, drove over him with a car. The two accomplices then stabbed the victim thirty to forty times in the head and chest. Although Encinas' participation in the crime was substantial, he received life imprisonment. As mitigation, the court found Encinas age, 18, that his participation in the crime was less than his accomplices', no prior criminal record, and a showing of genuine remorse, coupled with favorable recommendations by probation officers.

In State v. Mata, supra, the two brothers, Alonzo and Luis, raped and beat the victim until she lost consciousness. They put her in a car and drove her to a riverside where Luis killed her by cutting her throat. While Luis received the death penalty, Alonzo received life imprisonment based on the mitigating facts that he was not the actual killer, his young age (an "inexperienced" eighteen-year-old), no prior criminal record and cooperation with the police.

In both State v. Mata, supra, and State v. Encinas, supra, the evidence was uncontroverted that the accomplices did not commit the actual killing and other circumstances mitigated the imposition of the death penalty. This is not so in the present case. Logan and Gillies perpetrated crimes upon the victim which resulted in her death. Each man has accused the other of being the actual killer. We do not consider it critical who actually struck the fatal blow for, at a minimum, appellant handed Logan the rock, knowing that Logan intended to use it to kill the victim. Appellant's confessed participation in the crime is an admission that he killed Suzanne Rossetti. See **State v. Tison**, 129 Ariz. 526, 633 P.2d 335 (1981) (where the reviewing court found that even though Tison did not actually pull

the triggers on the guns which inflicted the fatal wounds, he was present when the murders took place and his participation was substantial. At a minimum, Tison stood by, armed with a gun, while his companions murdered the victims).

We are not persuaded that Gillies was sentenced to death in an arbitrary fashion violative of the eighth and fourteenth amendments and do not find the sentence of death imposed here to be excessive or disproportionate to the penalty imposed in similar cases. See State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978), affirmed, 127 Ariz. 531, 622 P.2d 478 (1980) (defendant beat victim with a claw hammer, dragged him to a mine shaft 15 feet deep into which the victim either fell or was thrown; defendant then threw rocks on top of victim); State v. Mata, supra (sexual assault and murder); State v. Zaragoza, supra (sexual assault and murder found heinous and depraved).

We have reviewed the record for fundamental error, A.R.S. § 13-4035, and having found none, we affirm appellant's convictions on all counts and his sentence of death.

We remand for resentencing on Count I, kidnapping; Count II, sexual assault; Count III, aggravated robbery; and Count V, computer fraud in the first degree.

JACK D. H. HAYS
Justice

CONCURRING:

WILLIAM A. HOLOHAN, Chief Justice

FRANK X. GORDON, JR., Vice Chief Justice

JAMES DUKE CAMERON, Justice

STANLEY G. FELDMAN, Justice

SCHOTLAND & STUEHRINGER
ATTORNEYS AT LAW
TRANSAMERICA BUILDING, SUITE 611
177 NORTH CHURCH AVENUE
TUCSON, ARIZONA 85701

MARVIN I. SCHOTLAND
JAMES W. STUEHRINGER

TELEPHONE
(602) 622-4668

June 6, 1983

RECEIVED
JUN 10 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Clerk of the U. S. Supreme Court
1 First Street N.E.
Washington, D.C. 20543

Attention: Mr. Frank Lorson,
Chief Deputy Clerk

Re: Jimmie Wayne Jeffers vs. The State of Arizona
Case No. 82-6870

Dear Mr. Lorson:

I represent Mr. Jeffers in the above-referenced capital case. This proceeding for certiorari before your Court is brought on direct appeal from the judgment and order affirming my client's conviction and death sentence handed down by the Arizona Supreme Court on April 5, 1983.

It is my understanding that the cert petition in this matter was filed with the Court June 6, 1983, and thus was untimely by one (1) day. The purpose of this letter is to explain the circumstances which caused the one day delay in the filing and to request that the Court, nevertheless, agree to consider Mr. Jeffers' capital case.

At the outset, it is my understanding that because this proceeding is on a direct appeal from the Arizona Supreme Court the 60 day filing requirement is "non-jurisdictional" in nature and that, therefore, the Court has discretion to waive the timeliness requirement. Because the cert petition was one (1) day late in filing and because that was caused by circumstances certainly beyond my client's control, I would request that the Court exercise its discretion and thus consider Mr. Jeffers' case.

The reason for the one (1) day lateness in filing is as follows. My office made arrangements with the Federal Express to air transport the cert petition to Washington, which was done on Friday, June 3, 1983. I further had made arrangements with a process service organization in Washington, D.C., Accurate Legal Service, Inc., 306 H Street N.E., Washington, D.C., to pick up the papers from Federal Express and have them filed with the U. S. Supreme Court Saturday morning. The papers were in Washington, D.C. Saturday morning. A Mr. Jim Smith, an employee of Accurate Legal Service, attempted to pick up the papers but, for reasons unclear to me, Federal Express had them on the wrong truck and it was not until approximately 11:30 A.M. Saturday morning

that the Federal Express people finally uncovered the papers that had all along been in their possession.

In any event, Mr. Smith at that time received the papers but was unable to get them to the U. S. Supreme Court prior to its Saturday closing time of 12:00 noon. Thus, the papers themselves were in Washington and in the hands of a process server to be filed prior to the Court's closing time, but for the above stated reasons simply were not filed. Moreover, as is reflected in the attached letter from my office to the process server our express instructions had specified June 4, 1983 as the filing date.

I have personally spoken with Mr. Smith and have requested that he provide me with an affidavit setting forth his contacts with the Federal Express people and the fact that he actually had the documents Saturday prior to noon in Washington, D.C. Upon receipt of said affidavit I will naturally forward same to the Court.

I sincerely hope that the above explanation is sufficient for the Court to exercise its discretion and hear my client's case despite the one day lateness in filing. Should you have any questions regarding this matter, please do not hesitate to contact me.

Very truly yours,

SCHOTLAND & STUEHRINGER

James w. Stuehringer

JWS/mer
Enclosure

June 3, 1983

Accurate Legal Service, Inc.
306 H Street N.E.
Washington, D.C. 20002

Attention: Linda

Re: Jimmie Wayne Jeffers vs. The State of Arizona

Dear Linda:

Pursuant to a telephone conversation with your office today enclosed are the documents to be filed with the U. S. Supreme Court. A I stated on the phone, the papers are to be filed June 4, 1983, which according to the Clerk of that Court, is a working day for them. Whe you file these documents, please have the Clerk date stamp the enclose copy of the title page and return it to me in the enclosed envelope s we have a file-stamped copy in our records.

Also, upon filing please call us, collect, at one of the followin numbers:

Mary (office)	(602) 622-4668
Mary (home)	(602) 889-6320
Jim (home)	(602) 622-4122

Enclosed please find our check in the amount of $100.00 ($40 for pick-up and $60 for filing) to cover your costs. Thank you for your cooperation.

Very truly yours,

SCHOTLAND & STUEHRINGER

Mary E. Rath, Secretary to
James W. Stuehringer

JWS/mer
Enclosures

SCHOTLAND & STUEHRINGER
ATTORNEYS AT LAW
TRANSAMERICA BUILDING, SUITE 611
177 NORTH CHURCH AVENUE
TUCSON, ARIZONA 85701

MARVIN I. SCHOTLAND
JAMES W. STUEHRINGER

RECEIVED
JUN 10 1983
OFFICE OF THE CLERK
SUPREME COURT, U.S.

June 13, 1983

Clerk of the U. S. Supreme Court
1 First Street N.E.
Washington, D.C. 20543

Attention: Mr. Frank Lorson,
Chief Deputy Clerk

Re: Jimmie Wayne Jeffers vs. The State of Arizona
Case No. 82-6870

Dear Mr. Lorson:

On June 6, 1983, I wrote to you explaining the circumstances surrounding the untimely filing of our petition for writ of certiorari. In that letter I indicated there would be an affidavit from the process server which I would forward to you upon receipt. Therefore, enclosed please find the affidavit from Jim Smith of Accurate Legal Services, Inc. referred to.

If you have any questions regarding this, please feel free to contact me.

Very truly yours,

SCHOTLAND & STUEHRINGER

James W Stuehringer

James W. Stuehringer

JWS/mer
Enclosure

Re: Jimmie Wayne Jeffers vs. The State of Arizona
Case No. 82-6870

I, JAMES P. SMITH, being duly sworn according to law deposes and says:

That on June 3, 1983, Mary E. Rath, Secretary to Mr. James W. Stuehringer of Schotland and Stuehringer, 177 North Church Avenue, Tucson, Arizona 85701, called our office requesting our services for court filing with the United States Supreme Court on June 4, 1983. Her instructions were to pick up the package, which contained the documents for filing with the United States Supreme Court, at 8:30 A.M. on June 4, 1983 at Federal Express, 1500B Philadelphia Way, Lanham, Maryland. She stated that she had been informed by Federal Express that the package would be there at 8:30 A.M.

I arrived at Federal Express at 8:30 A.M. on June 4, 1983. I spoke with a female employee by the name of Regina, who informed me that they could not locate the package. I immediately contacted Mary E. Rath at her home and advised her of the problem. She stated that she would go to her office and get the air bill number for the package which in turn would hopefully help to locate the package.

At this time, I called the United States Supreme Court and was informed by the clerk that they would be closing at 12:00 noon.

I gave Regina my office telephone number and asked her to contact the office immediately upon locating the package. I informed her that the court would be closing at noon and that the documents had to be filed before that time.

At approximately 11:25 A.M., Federal Express contacted our office by telephone stating they had located the package. Due to the time factor, it was impossible for me to return to Lanham, Maryland and pick up the package and return to the United States Supreme Court before noon.

I contacted Mary E. Rath and advised her of the matter. She informed me that the filing could be done first thing on Monday, June 6, 1983.

JAMES P. SMITH

Subscribed and sworn to before me this 6 day of June, 1983.

NOTARY PUBLIC

My Commission Expires May 31, 1988.

82-6870

Office - Supreme Court, U.S.
FILED
JUN 6 1983
ALEXANDER L. STEVAS
CLERK

LAW OFFICE OF SCHOTLAND & STUEHRINGER
177 North Church, Suite 611
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OFFICE OF PIMA COUNTY PUBLIC DEFENDER
45 West Pennington
Tucson, Arizona 85701

Telephone: (602) 791-3300

Attorneys James W. Stuehringer and Donald S. Klein for
Petitioner

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

NO. _____

JIMMIE WAYNE JEFFERS,

Petitioner,

vs.

THE STATE OF ARIZONA,

Respondent.

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Petitioner, JIMMIE WAYNE JEFFERS, asks leave

to file the attached Petition for a Writ of Certiorari without prepayment of costs and to proceed in forma pauperis.

The Petitioner's affidavit in support of this motion is attached hereto. Petitioner proceeded as an indigent represented by Court appointed counsel throughout all state court proceedings.

DATED this 3rd day of June, 1983.

SCHOTLAND & STUEHRINGER

BY: _____
JAMES W. STUEHRINGER, Attorneys for Petitioner JIMMIE WAYNE JEFFERS

PIMA COUNTY PUBLIC DEFENDER

BY: _____
DONALD S. KLEIN, Attorneys for Petitioner JIMMIE WAYNE JEFFERS

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED

IN FORMA PAUPERIS

STATE OF ARIZONA)
) ss.
COUNTY OF PIMA)

I, JIMMIE WAYNE JEFFERS, being first duly sworn, depose and say that I am the Petitioner in the instant Petition for Certiorari, that I am the Appellant in No. 4253 in which the Arizona Supreme Court affirmed my judgment and conviction and in which the Arizona Supreme Court denied a Motion for Rehearing, that in support of my motion to proceed in the Petition for Certiorari without being required to prepay fees, costs of give security therefore, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor; and that I believe I am entitled to redress.

I further swear that the response which I have made to the questions and answers below relating to my ability to pay the cost of prosecuting the Petition for Certiorari are true.

1. Are you presently employed?

ANSWER: No.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payment, interest, dividends, or other source?

ANSWER: No.

3. Do you own any cash or checking or savings account?

ANSWER: No.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

ANSWER: No.

5. I have been in the custody of the Arizona Department of Corrections since April of 1978 and remain so at this time.

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties of perjury.

Jimmie Wayne Jeffers
JIMMIE WAYNE JEFFERS

SUBSCRIBED AND SWORN to before me this 2nd day of June, 1983, by JIMMIE WAYNE JEFFERS.

Mary E Rock
NOTARY PUBLIC

My commission expires:

April 30, 1984

FJL 8

ORIGINAL

Office - Supreme Court, U.S.
FILED
JUL 8 1983
ALEXANDER L. STEVAS,
CLERK

Summer List 10, Page 32

NO. 82-6870

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

JIMMIE WAYNE JEFFERS,

Petitioner,

-vs-

THE STATE OF ARIZONA,

Respondent,

ON WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

GERALD R. GRANT
Assistant Attorney General
Department of Law
1275 W. Washington, 2nd Floor
Phoenix, Arizona 85007
Telephone: (602)255-4686

Attorneys for RESPONDENT

QUESTIONS PRESENTED FOR REVIEW

1. Has the Arizona Supreme Court violated the United States Constitution by refusing to remand petitioner's case to the trial court for resentencing after it struck down one of the statutory aggravating circumstances found by the trial court?

2. Has the Arizona Supreme Court construed the phrase "especially heinous, cruel and depraved" in such a way that it gives proper guidance to the sentencing authority?

3. Did petitioner have a reasonable expectation of privacy in a note that he voluntarily gave to a detention officer?

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STATEMENT OF THE CASE

On February 9, 1978, a jury convicted petitioner of the first-degree murder of Penelope Cheney. On July 10, 1980, the Honorable Ben C. Birdsall of the Pima County Superior Court imposed a death sentence for that crime. Petitioner's direct appeal to the Arizona Supreme Court was unsuccessful: on January 24, 1983, that court affirmed the judgment of guilt and sentence imposed. State v. Jeffers, ____Ariz.____, 661 P.2d 1105 (1983). This petition for certiorari followed.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

ARGUMENTS

I

SINCE THE TRIAL COURT HAD FOUND NO MITIGATING CIRCUMSTANCES, THERE WAS NO NEED TO REMAND FOR RESENTENCING AFTER THE ARIZONA SUPREME COURT STRUCK DOWN ONE OF THE AGGRAVATING CIRCUMSTANCES.

Petitioner claims that the Arizona Supreme Court erred in upholding his death sentence after it had struck down one of the statutory aggravating circumstances found by the trial court and modified the other. According to petitioner, the Arizona Supreme Court should have remanded the matter to the trial court for resentencing. Its failure to do so, petitioner alleges, amounts to a violation of the Eighth Amendment requirement that capital sentencing discretion be properly channeled by specifically articulated standards. Respondent submits that petitioner's claim is meritless.

Petitioner relies upon this Court's decision in Zant v. Stephens, ____U.S.____, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), to support his position, claiming that the Zant case discussed an issue "identical" to that presented in

the instant case. In Zant, the jury convicted the defendant of murder, found three statutory aggravating circumstances, and imposed the death penalty. On direct appeal, the Georgia Supreme Court affirmed, even though it set aside the second aggravating circumstance found by the jury. Stephens v. State, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986 (1976). The Georgia Supreme Court had previously stated that where two or more aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon. However, the Georgia court had never explained the rationale for its position. Under Georgia law, the jury must find at least one statutory aggravating circumstance before it can recommend the death penalty, and the trial court must follow a recommendation of death. Even if the jury finds an aggravating circumstance and no mitigation, it may recommend a life sentence rather than death. In light of the uncertainty about the rationale for the Georgia court's position, this Court remanded the matter to the Georgia court for a statement of the premises of state law that support the conclusion that a death sentence is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury.

In petitioner's case, the trial court found two statutory aggravating circumstances: 1) that petitioner committed the murder in an especially heinous, cruel, and depraved manner; and 2) that petitioner knowingly created a grave risk of death to others in the commission of the murder. See Ariz.Rev.Stat.Ann. § 13-703(F)(3) and (6). The trial court found no mitigating circumstances. On direct appeal, the Arizona Supreme Court held that the

evidence did not support a finding of grave risk of death to others or a finding that the murder was especially cruel. However, the Arizona court agreed that the murder was especially heinous and depraved. State v. Jeffers, supra, ____Ariz. at ____, 661 P.2d at 1129-31. The Arizona Supreme Court also affirmed the trial court's findings on mitigating circumstances. 661 P.2d at 1131-33.

Petitioner argues that the Arizona Supreme Court recently remanded a case similar to his for resentencing and cited Zant v. Stephens, supra, as authority for this action. The case petitioner refers to is State v. Gillies, No. 5424 (Ariz.Sup.Ct., Apr. 19, 1983). In that case, the Arizona court struck down three of the four aggravating circumstances found by the trial court. Noting that the trial court had indicated there were mitigating circumstances present but that they were not sufficiently substantial to call for leniency, the Arizona Supreme Court stated:

> Law and policy would indicate that the trial judge should again make the determination required by A.R.S. § 13-703(E). See also Zant v. Stephens, ____U.S.____, 102 S.Ct. 1856 (1982).

Slip opinion, at 2. Petitioner asserts that this remand procedure should have been followed in his case.

Assuming for the sake of argument that the Arizona Supreme Court's decision in State v. Gillies, supra, amounts to a holding that a remand for resentencing is required where a statutory aggravating circumstance is struck down on appeal, there is still no basis for a remand in petitioner's case. Under Arizona law, a trial court must impose a sentence of death if it finds one or more aggravating circumstances and no mitigating circumstances. Ariz.Rev.Stat.Ann. § 13-703(E). Thus, in the Gillies case, although the trial court found the mitigating circumstances

to be insufficient to call for leniency when balanced against the four statutory aggravating circumstances, it is uncertain whether the trial court would have reached the same conclusion in balancing the mitigating factors against only one statutory aggravating circumstance. That same uncertainty is at the heart of this Court's decision in Zant v. Stephens, supra: whether the jury would still have recommended a death sentence based upon two rather than three aggravating factors. In petitioner's case, however, there is no uncertainty. The Arizona Supreme Court found one valid statutory aggravating circumstance and no mitigation. Under these circumstances, the trial court has to impose a sentence of death. Thus, there was no need for a remand for resentencing in petitioner's case.

II

THE ARIZONA SUPREME COURT HAS INTERPRETED THE "ESPECIALLY HEINOUS, CRUEL OR DEPRAVED" LANGUAGE OF ARIZONA'S DEATH PENALTY STATUTE IN A MANNER THAT IMPOSES MEANINGFUL LIMITS ON SENTENCING DISCRETION.

Petitioner contends that the Arizona Supreme Court has violated the Eighth and Fourteenth Amendments by holding that the statutory aggravating circumstance that the murder be committed in an especially heinous, cruel, or depraved manner must be read in the disjunctive. According to petitioner, such a construction is unconstitutionally overbroad in that it does not impose meaningful limits on sentencing discretion. Thus, petitioner concludes, the Arizona court is without a principled manner to distinguish cases in which the death penalty should be imposed from those in which it should not be.

Petitioner's reliance here is on this Court's decision in Godfrey v. Georgia, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). A jury convicted Godfrey of two counts of murder and imposed sentences of death on each. The

death sentences were based upon the jury's finding "that the offense of murder was outrageously or wantonly vile, horrible and inhuman." Under Georgia law, one of the statutory aggravating circumstances requires proof beyond a reasonable doubt that the offense "was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." This Court's concern was whether the Georgia Supreme Court had construed the language of this aggravating circumstance in such a manner as to provide clear and objective standards that would avoid the arbitrary and capricious infliction of the death sentence. A plurality of this Court noted that a person of ordinary sensibility could fairly characterize almost every murder as "outrageously or wantonly vile, horrible and inhuman." More importantly, the trial court did nothing to dissuade Godfrey's jury from this notion: it gave the jury no guidance concerning the meaning of any of the terms used in the statutory aggravating circumstance. Further, the Georgia Supreme Court's affirmance of Godfrey's death sentences did not limit the application of this aggravating circumstance as it had done in other cases. Therefore, this Court reversed the judgment of the Georgia Supreme Court insofar as it left standing Godfrey's death sentences.

Under Arizona law, one of the statutory aggravating circumstances requires proof that the defendant committed the offense in an especially heinous, cruel or depraved manner. Ariz.Rev.Stat.Ann. § 13-703(F)(6). The trial court found that petitioner's murder of Ms. Cheney was especially heinous, cruel and depraved. On direct appeal, the Arizona Supreme Court overturned the trial court's finding on cruelty, but upheld the finding on the

especially heinous and depraved nature of the crime. State v. Jeffers, supra, 661 P.2d at 1129-31. The Arizona court has long held that this particular aggravating circumstance must be read in the disjunctive, and thus it concluded that the trial court had correctly found an aggravating circumstance even though one portion of that finding (cruelty) had been erroneous. See, e.g., State v. Clark, 126 Ariz. 428, 616 P.2d 888, cert. denied, 449 U.S. 1067 (1980).

Petitioner's complaint is that the disjunctive reading of Ariz.Rev.Stat.Ann. § 13-703(F)(6) allows arbitrary imposition of the death penalty since that aggravating circumstance would apply to any murder. Godfrey v. Georgia, supra, does not set forth a hard and fast rule that aggravating circumstances of this sort must not be read in the disjunctive or they will be found to be unconstitutional. The Godfrey decision, like its predecessors Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976), and Proffitt v. Florida, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), holds only that language of the sort employed in § 13-703(F)(6) must be narrowly construed to give adequate guidance to the sentencing authority. The Arizona Supreme Court has issued numerous opinions construing the phrase "especially heinous, cruel or depraved." See Exhibit "A." Many of those opinions have struck down trial court findings concerning this aggravating circumstance. In addition, the Arizona court has insisted that the killing must be especially heinous, cruel or depraved. Another factor that distinguishes the Godfrey case from petitioner's is that in Arizona the trial judge, not the jury, imposes sentence. Ariz.Rev.Stat.Ann. § 13-703(B), (E). A trial judge who must determine whether a killing is "especially heinous,

cruel or depraved" can read the Arizona cases and use them for guidance. In this manner, the Arizona Supreme Court has sufficiently directed and limited the discretion of the sentencing authority, thereby complying with the requirements of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and Gregg v. Georgia, supra. Petitioner's complaint that § 13-703(F)(6) is applicable to any and all murders is contradicted by the numerous decisions listed in Exhibit "A" and by the decision in petitioner's own case.

III

PETITIONER HAD NO REASONABLE EXPECTATION OF PRIVACY IN A NOTE THAT HE VOLUNTARILY GAVE TO A JAIL DETENTION OFFICER.

Petitioner argues that the warrantless search and seizure of his written communication by a jail official violated the Fourth and Fourteenth Amendments. Petitioner wrote the note on a piece of paper while confined in the Pima County jail on several pending charges. Petitioner folded the paper and gave it to a detention officer to deliver to another jail inmate. The officer opened the note, read it, and turned it over to his superiors. The note was eventually admitted in evidence against petitioner at trial. By upholding the admission of this note, petitioner contends, the Arizona Supreme Court has violated his constitutional rights and taken a position that is inconsistent with case law from other jurisdictions.

The application of the Fourth Amendment depends upon whether the person invoking its protection can claim a justifiable, reasonable, legitimate expectation of privacy that has been invaded by the challenged governmental action. This test involves a subjective element (whether the individual himself has exhibited an expectation of privacy) and an objective element (whether the individual's

subjective expectation is one that society is prepared to recognize as reasonable). Smith v. Maryland, 442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). This Court has recognized that a person incarcerated pending trial simply does not possess the full range of freedoms of an unincarcerated individual. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In Bell v. Wolfish, supra, this Court discussed the applicability of the Fourth Amendment to pretrial detainees:

> It may well be argued that a person confined in a detention facility has no reasonable expectation of privacy with respect to his room or cell and that therefore the Fourth Amendment provides no protections for such a person. In any case, given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope.

441 U.S. at 556-57, 99 S.Ct. at 1883, 60 L.Ed.2d at 480 (citations omitted).

The Arizona Supreme Court did not hold in petitioner's case that the Fourth Amendment does not apply to pretrial detainees. It merely held that under the circumstances present in this case, petitioner's expectation of privacy was not justifiable, reasonable, or legitimate. Petitioner voluntarily gave his note to a guard for delivery to another inmate. The note was not sealed in an envelope and petitioner did not ask the guard not to read it. In light of this Court's pronouncements on the applicability of the Fourth Amendment to pretrial detainees, the Arizona Supreme Court plainly did not err in upholding the admission of the note. Petitioner's conduct in surrendering the note to a guard demonstrates that his expectation of privacy was not justifiable.

Petitioner's claim that the Arizona court's decision is inconsistent with case law from various federal circuits is

not well founded. None of the cases cited by petitioner deals with a situation similar to petitioner's. Both United States v. Hinckley, 672 F.2d 115 (D.C. Cir. 1982), and United States v. Valley, 653 F.2d 403 (9th Cir. 1981), deal with seizures of papers from an inmate's cell, and in the latter case the seizure was upheld. While United States v. Savage, 482 F.2d 1371 (9th Cir. 1973), cert. denied, 415 U.S. 932 (1974), may be arguably similar to petitioner's situation, Savage's note was in a sealed envelope destined for deposit in the United States mail. Further, the Savage decision preceded that of this Court in Bell v. Wolfish, supra.

CONCLUSION

Because petitioner has failed to show a violation of any constitutional right, this Court should deny the Petition for Certiorari.

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Gerald R. Grant

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A F F I D A V I T

STATE OF ARIZONA)
) ss.
COUNTY OF MARICOPA)

GERALD R. GRANT, being first duly sworn upon oath, deposes and says:

That he served the attorneys for the petitioner in the foregoing case by forwarding one (1) copy of OPPOSITION TO PETITION FOR WRIT OF CERTIORARI, in a sealed envelope, first class postage prepaid, and deposited same in the United States mail, addressed to:

JAMES W. STUEHRINGER
c/o Waterfall, Economidis, Caldwell & Hanshaw, P.C.
5151 East Broadway, Suite 1600
Tucson, Arizona 85711
Attorney for APPELLANT

DONALD S. KLEIN
Pima County Public Defender
45 West Pennington
Tucson, Arizona 85701

this 5th day of July, 1983.

Gerald R. Grant
GERALD R. GRANT

SUBSCRIBED AND SWORN to before me this 5th day of July, 1983.

NOTARY PUBLIC

My Commission Expires:

[illegible]

CR21-128
2304D clp

EXHIBIT "A"

CASES CONSTRUING THE PHRASE
"HEINOUS, CRUEL OR DEPRAVED"

State v. Jeffers, ____Ariz.____, ____, 661 P.2d 1105, 1130-31 (1983) (overturning trial court's finding of cruelty).

State v. Gerlaugh, ____Ariz.____, ____, 659 P.2d 642, 643-44 (1983).

State v. Zaragoza, ____Ariz.____, ____, 659 P.2d 22, 28-29, cert. denied, ____U.S.____ (1983).

State v. Gretzler, ____Ariz.____, ____, 659 P.2d 1, 9-12, cert. denied, ____U.S.____ (1983).

State v. Woratzeck, ____Ariz.____, ____, 657 P.2d 865, 870 (1982) (overturning trial court's finding of cruelty).

State v. Poland, 132 Ariz. 269, 285, 645 P.2d 784, 800 (1982) (overturning trial court's finding).

State v. Blazak, 131 Ariz. 598, 604, 643 P.2d 694, 700, cert. denied, ____U.S.____, 103 S.Ct. 189, 74 L.Ed.2d 149 (1982) (overturning trial court's finding).

State v. Ortiz, 131 Ariz. 195, 206, 210, 639 P.2d 1020, 1031, 1035, (1981), cert. denied, ____U.S.____, 102 S.Ct. 2259, 72 L.Ed.2d 863 (1982) (overturning trial court's finding of cruelty).

State v. Tison (Ray), 129 Ariz. 546, 555, 633 P.2d 355, 364 (1981), cert. denied, ____U.S.____, 102 S.Ct. 180, 74 L.Ed.2d 147 (1981).

State v. Tison (Rick), 129 Ariz. 526, 542-44, 633 P.2d 335, 351-53, cert. denied, 454 U.S. 848 (1981).

State v. Vickers, 129 Ariz. 506, 515, 633 P.2d 315, 324 (1981).

State v. Bishop, 127 Ariz. 531, 534, 622 P.2d 478, 481 (1980) (overturning trial court's finding of cruelty).

State v. Clark, 126 Ariz. 428, 436-37, 616 P.2d 888, 896-97, cert. denied, 449 U.S. 1067 (1980) (overturning trial court's finding of cruelty).

State v. Ceja, 126 Ariz. 35, 39-40, 612 P.2d 491, 495-96 (1980) (overturning trial court's finding of cruelty).

State v. Steelman, 126 Ariz. 19, 26, 612 P.2d 475, 482, cert. denied, 449 U.S. 913 (1980).

State v. Madsen, 125 Ariz. 346, 352, 609 P.2d 1046, 1052, cert. denied, 449 U.S. 873 (1980) (overturning trial court's finding).

State v. Lujan, 124 Ariz. 365, 372-73, 604 P.2d 629, 636-37 (1979) (overturning trial court's finding).

State v. Brookover, 124 Ariz. 38, 40-41, 601 P.2d 1322, 1324-25 (1979) (overturning trial court's finding).

State v. Watson, 120 Ariz. 441, 448, 586 P.2d 1253, 1260 (1978), cert. denied, 440 U.S. 924 (1979).

State v. Ceja, 115 Ariz. 413, 417, 565 P.2d 1274, 1278 (1977).

State v. Knapp, 114 Ariz. 531, 543, 562 P.2d 704, 716 (1977), cert. denied, 435 U.S. 908 (1978).

State v. Blazak, 114 Ariz. 199, 206, 560 P.2d 54, 61 (1977).